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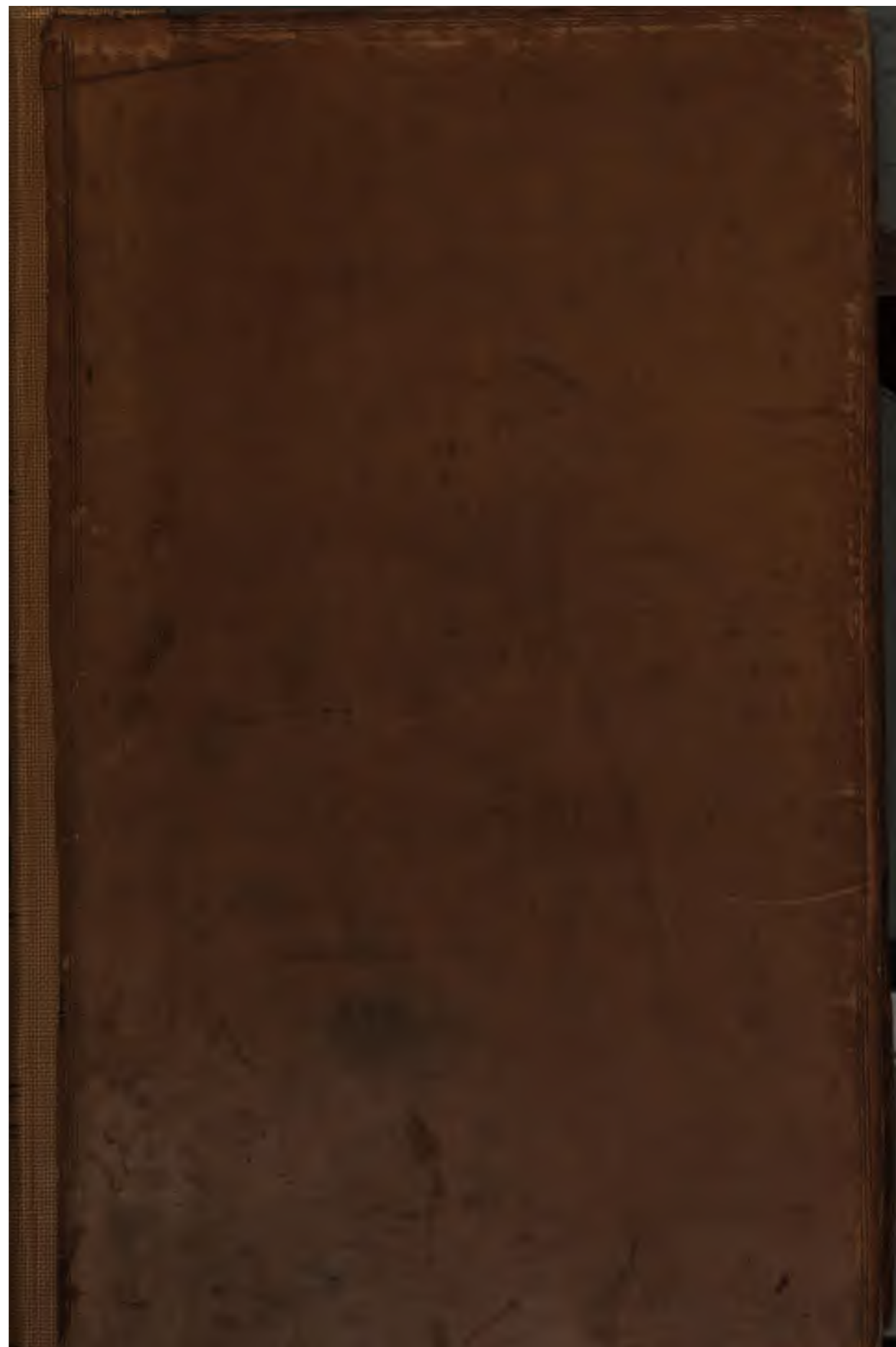
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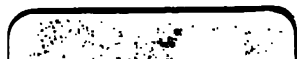
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OW . U . K .

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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY

DURING THE TIME OF
Lord Chancellor Lyndhurst.

By JAMES RUSSELL, Esq.
BARRISTER AT LAW.

VOL. IV.
1827, 1828. — 8 & 9 GEO. IV.

LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY ;
FOR SAUNDERS AND BENNING,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43. FLEET-STREET.
1830.



Lord LYNTHURST, *Lord High Chancellor.*

Sir JOHN LEACH, *Master of the Rolls.*

Sir LANCELOT SHADWELL, *Vice-Chancellor of England.*

Sir CHARLES WETHERELL, } *Attorneys-General.*
Sir JAMES SCARLETT, }

Sir N. C. TINDAL, *Solicitor-General.*

ERRATA.

VOL. III.

Page 546. line 8. from the top, for "*Scougell's*," read "*Stead's*."

VOL. IV.

112. in the placitum, lines 11. and 10. from the bottom, for "increase," read
"exercise."

317. in the note, for "*Humberstond v. Humberstond*," read "*Humberston v. Humberston*."

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

BRYANT v. BUSK.

ROLLS.

1827.

Nov. 12.

THE bill was filed for the specific performance of a contract, entered into by the Defendant for the purchase of an estate from the Plaintiff. It appeared on the pleadings, that, after the delivery of the abstracts, of which there were several, and which had been compared with the deeds by the solicitor of the Defendant, but prior to any approbation of the title, the office of the Plaintiff's solicitor was consumed by accidental fire, and some material title-deeds were destroyed.

At the original hearing of the cause before Lord *Gifford*, he referred it to the Master to inquire, whether the abstracts delivered disclosed a good title, and whether the Plaintiff could then make a good title, having regard to the fact of the destruction or loss of the title-deeds.

The Master reported that the abstracts delivered did disclose a good title to the estate, and that the Plain-

VOL. IV.

B

If, after a contract for sale of an estate, but before the title is accepted, the title-deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered.

1827.

BRYANT

v.

BUSK.

tiff could then make a good title, regard being had to the fact of the destruction or loss of the title-deeds.

The Defendant excepted to the report.

The cause came on to be heard in *July* last on the exceptions, and for further directions.

In support of the exceptions, it was contended, that the Master had fallen into the mistake of supposing that the abstracts were evidence of the contents of the deeds, and, therefore, being admissible, after the loss of the original deeds, would enable the purchaser to defend his possession. That was an error: there might be many material covenants which would not be established by the production of an abstract. But where was the evidence that the instruments, the purport of which was contained in the abstracts, had been executed or delivered? The vendor ought, at least, to state, who were the attesting witnesses; not because it was necessary that deeds should be attested, but because attesting witnesses were generally the only persons who had any information as to the delivery and execution of the instruments which were attested by them. If there were no attesting witnesses, or if their names could not be ascertained, the purchaser had then a right to require to be furnished with some other evidence sufficient to protect his possession: but no such evidence was furnished; nor was it pretended that any such evidence existed.

July 30.

The MASTER of the ROLLS was of opinion that the Plaintiff was at all events bound, if the deeds were destroyed, to furnish the purchaser with the means of proving the deeds and their contents; and that, if the abstracts were sufficient proof of their contents, yet, in order to prove the execution and delivery of the deeds,
it

CASES IN CHANCERY.

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it was necessary to know the names of the attesting witnesses. He therefore referred it to the Master to inquire who were the attesting witnesses to the several deeds destroyed.

1827.

BRYANT
v.
BUSE.

On a subsequent day, the Plaintiff's counsel stated, that their client found upon inquiry, that he could furnish no evidence as to the names of the attesting witnesses, or as to the execution or delivery of the deeds, and was ready to consent, that the cause should again be set down for hearing, as if the Master had reported that no further evidence could be furnished.

The cause now came on accordingly.

Nov. 12.

Mr. *Horne* and Mr. *Ching*, for the Plaintiff.

Mr. *Shadwell* and Mr. *Theobald*, for the Defendant.

For the Plaintiff were cited *Paine v. Meller* (a), *Revell v. Hussey* (b), *Mortimer v. Capper* (c): which, it was said, established the principle, that subsequent events will not vary a contract fairly entered into, or affect the right of a party to have such a contract specifically performed. And it was insisted, that the Defendant having become by the contract the equitable owner of the property, the destruction of the title-deeds was his loss, and he must nevertheless abide by the contract: and, further, that, if the proposition could not be maintained to that extent, yet his solicitor, having examined the deeds with the abstract, had the opportunity, before the fire happened, to inform himself of the names

(a) 6 Ves. 569. (b) 2 Ball & Bea. 287. (c) 1 Brown, 154.

1827.

BRYANT
v.
BUNK.

names of the attesting witnesses to the deeds, and if he had failed to do so, the Defendant must suffer from his negligence.

The MASTER of the ROLLS.

In this case it is not open to the Defendant to contend, that the mere destruction of the title-deeds will discharge a purchaser from the contract. In order to raise that question, he must rehear Lord *Gifford's* decree, which necessarily infers, that a purchaser may be bound, notwithstanding the loss of the title-deeds.

The case of *Paine v. Meller* has no application here. There, after the title was accepted, the houses, which were the subject of the contract, were destroyed; and Lord *Eldon* was of opinion, that, the equitable title being complete, the loss must fall upon the purchaser, although he had at the time no conveyance. The other cases cited refer to the same principle. This is the case—not of the destruction of the property—but of the destruction of the title-deeds before a conveyance, and before the title was accepted.

Every vendor must necessarily be bound to furnish the purchaser with the means of asserting his title and defending his possession. The title-deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. There may be means of proving what were the contents of the deeds, and that the deed were duly executed and delivered. Assuming that the abstracts here duly and fully prove the contents of the deeds, yet, it remains to be proved that such deeds were duly executed and delivered; and the vendor must furnish the purchaser with the means of such proof. And, it being admitted that no such proof
can

can be furnished, the purchaser is entitled to be discharged.

1827.

BRYANT

v.

BOSE.

With respect to the alleged specialty in this case, — that the Defendant's solicitor, having before the fire examined the deeds for the purpose of comparing them with the abstracts, had the opportunity to learn who were the attesting witnesses, and that the Defendant must sustain the inconvenience of his negligence in that respect, — it is to be observed, that the purpose of the examination of the deeds by the Defendant's solicitor was merely to ascertain, whether the contents of the deeds corresponded with the statement in the abstract, and not to learn how the deeds were to be proved by secondary evidence, in case they should be destroyed; which event could not at that time be in the contemplation of any party: and, therefore, it cannot be imputed to him as culpable negligence, that he did not inform himself of the names of the attesting witnesses.

The bill must, therefore, be dismissed; and, as the Plaintiff fails in his case, it must be dismissed with costs.

Mr. *Sugden* then asked that the Plaintiff might be ordered to return the deposit; and he stated that Lord *Eldon*, in dismissing a vendor's bill for specific performance, had, after the point had been strongly argued, made a similar order. The Plaintiff, by filing his bill, gave the Court jurisdiction over him with respect to the deposit; and the Defendant ought not to be exposed to the vexation and expense of recovering it by action.

Mr. *Horne* observed, that the Court could not make such an order, because the deposit was in the hands of the auctioneer, who was not a party to the suit.

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BRYANT
v.
BUSK.

Mr. *Sugden* replied, that the money was in the hands of the auctioneer as the agent of the Plaintiff, and that he was, therefore, entitled to an order for payment. However, he would be satisfied with a direction that the Plaintiff should concur with the Defendant in an order upon the auctioneer to pay the deposit to the Defendant.

The Court was inclined to make an order to that effect: but the solicitors entered into an arrangement, which rendered it unnecessary to give any direction on the point.

ROLLS.

Nov. 15. 19.
26.

PAGE v. BROOM.

If an agreement be in part unperformed, the principle of a court of equity is compensation, not forfeiture.

Where a debtor, by a deed-poll, directs *inter alia* the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, and without the privy of the creditor.

THERE had been two previous hearings of this cause. The first was before one of the Judges, assisted by two Masters, sitting for Sir *Thomas Plumer*; and though on that occasion a judgment had been given, it was satisfactory to neither party, and no decree had been drawn up. The second hearing was before Lord *Gifford*; but his Lordship was of opinion, that there was a defect of parties in the constitution of the suit; and no judgment was pronounced on the merits.

The cause now came on before Sir *John Leach*, Master of the Rolls; and the circumstances of the case, so far as they are material to the principles on which the decision proceeded, are fully stated in His Honor's judgment.

Mr. *Pepys* and Mr. *Knight*, for the Plaintiff.

Mr. *Horne*, Mr. *Wakefeld*, and Mr. *Barber*, for the Defendants, the *Brooms* and *Rosser*.

Mr.

CASES IN CHANCERY.

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Mr. Sugden and Mr. Teed, for the Defendant Miss
Linwood.

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PAGE

v.

BROOM.

Mr. Treslove, for the Defendant Harris.

Mr. Agar, Mr. Bickersteth, and Mr. Jeremy, for other
Defendants.

The MASTER of the ROLLS.

Nov. 26.

In the month of June 1806, the late Mr. Thomas Willows was seised in fee-simple of Saville House, in Leicester Square, with the yard, stables, coach-houses, and back buildings belonging thereto; and of certain premises in Lisle Street behind the same, subject to a mortgage in fee for 6000*l.*; which mortgage in fee was vested in the late Mr. Richard Samuel White, and the Defendant Richard Rosser, but in trust, as to 3000*l.*, for Miss Linwood; and, as to the remaining 3000*l.*, for Messrs. John and Herbert Broom. It appears that Messrs. Broom had for some time been tenants under Mr. Willows of a part of Saville House, and of certain buildings behind it; that Miss Linwood had treated with Mr. Willows for the purpose of having certain exhibition-rooms for her use erected behind Saville House, on the site which was then occupied partly by the buildings in possession of Messrs. Broom, and partly by stables and coach-houses; and that thereupon it had been agreed between those three parties, that Mr. Willows should cause the coach-houses and stables, and other buildings behind Saville House, including those occupied by Messrs. Broom, to be pulled down, and new buildings to be erected on the site; and that four rooms on the first and second floors of the new buildings should be let to Messrs. Broom in lieu of the buildings occupied by them, which were to be taken down, and

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v.

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that other parts of the new buildings should be let to Miss *Linwood*.

The Plaintiff, Mr. *Page*, was the builder who was applied to by Mr. *Willows* for the purpose of doing the several works; and, it not being convenient to Mr. *Willows* to pay at once the whole expense, Mr. *Page* agreed to execute the works on having a lease of all the new buildings, except those which were to be let to Messrs. *Broom*, for forty-nine years, at a rent of 40s.; and Miss *Linwood* agreed to take from Mr. *Page*, at a rent of 250*l.*, an under-lease for the same term of the premises which she was to occupy, and to pay to him an immediate sum of 1000*l.* Mr. *Willows* further agreed to take of Mr. *Page*, for the same term, a lease of the remaining part of the new buildings, which was not to be occupied either by Messrs. *Broom* or Miss *Linwood*, at a rent of 200*l.* a year. The effect of the arrangement, therefore, was, that Mr. *Page* was to be paid for the cost of those works, as soon as they should be completed, an immediate sum of 1000*l.* by Miss *Linwood*, and an annual sum of 450*l.*, until he was fully paid all principal and interest due to him.

These several agreements were carried into legal effect by articles of agreement bearing date the 27th of *June* 1806, to which Mr. *Willows*, Miss *Linwood*, Messrs. *Broom*, Mr. *White* and Mr. *Rosser* (the trustees of the mortgage), and Mr. *Page*, were the parties. Mr. *Page* engaged to pull down the old buildings, and to complete the new works on or before the 30th of *January* 1807, according to certain plans and specifications referred to, and which were to be prepared by Mr. *Boyd*, a surveyor, and to be signed by Mr. *Willows*, Miss *Linwood*, Mr. *White*, Mr. *Rosser*, and Mr. *Page*: all parties agreed to join in a lease to Mr. *Page* on or before the

25th

25th of *March* 1807, or so soon as the buildings should be completed, for a term of forty-nine years from the 29th of *September* 1806, at a rent of 40s., to be paid to Messrs. *White* and *Rosser*: Miss *Linwood* agreed to pay to Mr. *Page* a sum of 1000*l.* by four half yearly instalments, commencing on the 24th of *June* 1807: and Mr. *Page* agreed thereupon to grant a lease to Miss *Linwood* of part of the new buildings for a term of forty-eight years and three quarters, wanting ten days, from the 25th of *December* 1806, at a rent of 250*l.*; and to grant to Mr. *Willows* a lease of the residue of the new buildings, except those to be occupied by Messrs. *Broom*, for the same term, at a rent of 200*l.* The value of the works was to be ascertained by Mr. *Page* and Mr. *Boyd*; and Mr. *Page* was to keep regular accounts and to strike a balance half-yearly, and was to produce such accounts, and all vouchers, to Mr. *Willows*.

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v.
BROOM.

On the 2d of *August* 1806, an indenture of four parts. was made and executed by and between Mr. *Willows* of the first part, Miss *Linwood* of the second part, Messrs. *White* and *Rosser* of the third part, and Messrs. *Broom* of the fourth part, whereby the other parties joined in demising to Messrs. *Broom* the premises which they then occupied in *Saville House*, and also the four rooms which they were to occupy in the new buildings, for a term of forty-nine years and a half from the 25th of *March* 1806, at an annual rent of 375*l.*, to be paid to *White* and *Rosser*, until the mortgage of 6000*l.* was discharged, and then to Mr. *Willows*.

On the 20th of *September* 1806, Mr. *Willows* executed an indenture, whereby, after reciting the agreement of the 27th of *June* 1806, and the lease of the 2d of *August* 1806, and the mortgage debt of 6000*l.*, and a certain other mortgage debt due to a Mr. and Mrs. *Browning*,
he

1827.

Page
v.
Broom.

he appointed Messrs. *White* and *Rosser* to be receivers of the rents of his property in *Leicester Square* and *Lisle Street*, and thereout to pay all taxes and charges, and next to pay the interest of the 6000*l.*, and then to pay the interest on *Browning's* mortgage, and all other incumbrances, if any, and to pay the residue first in discharge of the principal of the mortgage of 6000*l.*, and then in discharge of the principal of *Browning's* mortgage.

On the 30th of *September* 1806, Mr. *Willows* executed another indenture, whereby, after reciting, among other things, the agreement of the 27th of *June* 1806, and that it was uncertain whether the premises, which he was to take on lease from *Page*, would always produce a clear rent of 200*l.* a year, he directed *White* and *Rosser*, after paying off the 6000*l.* mortgage and interest, and the mortgage debt and interest to *Browning*, to pay the rent of 200*l.* to Mr. *Page*, or so much thereof as he, *Willows*, should not otherwise pay and satisfy.

On the 26th of *November* 1807, Mr. *Willows* executed a deed poll, which was indorsed on the last-mentioned indenture of the 30th of *September* 1806, whereby,— after reciting that Mr. *Page* had, at the request of Mr. *Willows*, advanced considerable sums of money to Mr. *Boyd*, which had been expended or applied towards the improvement of *Saville House* and the adjoining premises, and had also been put to great expense in making alterations in the old part of *Saville House*, which were not included in the agreement of *June* 1806; and that it had been agreed between Mr. *Willows* and Mr. *Page*, that, in compensation for and in satisfaction of such alterations, Mr. *Page* should receive the further yearly sum of 200*l.*, in addition to the 200*l.* mentioned in the indenture of the 20th of *September* 1806, making together the sum of
400*l.*

400*l.* for the term within mentioned,—Mr. *Willows* directed that *White* and *Rosser* should, out of the surplus rents and profits, after answering the purposes mentioned in the indenture of the 30th of *September* 1806, for the residue of Mr. *Page's* term pay the further yearly sum of 200*l.*, over and above and in addition to the yearly sum of 200*l.* mentioned in the said indenture, to be paid and payable on the days and times mentioned and appointed for the payment of the other yearly sum, and which additional yearly sum Mr. *Page* thereby covenanted to accept in full compensation and satisfaction of the said alterations and expenditure.

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PAEN
v.
BROOK.

It may be proper here to observe, that a question has been made as to the construction of this deed, — whether the purpose was to give an additional security for the whole demand of Mr. *Page*, in consideration of its being greatly increased by the payments made to Mr. *Boyd*, and by the alterations in the old house which were not included in the contract; or whether the additional 200*l.* a year was merely to be a security for this extra expense, and was to determine, when such extra expense was satisfied. The additional 200*l.* a year is, in expression, limited for the whole term of Mr. *Page's* lease, and is made payable on the days and times when the first 200*l.* was to be paid. There is no word which imports, that the additional 200*l.* was to cease before the other. The first was to endure for Mr. *Page's* whole term, unless Mr. *Page's* whole demand was previously satisfied: and the reasonable construction is, that the additional 200*l.* a year would have the same determination. The conduct of the parties is cotemporaneous evidence of their actual intention. The works which were in the contract, and those which were not in the contract, were included in one common account; which could not have been the case,

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case, if the extra works were intended to be the subject of a separate security.

On the 18th of *August* 1808, an agreement was signed by Mr. *Willows* in the form of a letter to Messrs. *White* and *Rosser*, whereby he agreed, that, by way of further security, Mr. *Page* should have an additional lease for fifty years, subject to the same covenants as were specified in the original agreement, and that the lease of the room over Miss *Linwood's* exhibition room should be made to Mr. *Page*, instead of being made to him, Mr. *Willows*.

On the 21st of *November* 1808, a further agreement was entered into between Miss *Linwood* of the one part, Mr. *Willows* of the second part, Mr. *Page* of the third part, and Messrs. *White* and *Rosser* of the fourth part; whereby, — after reciting the agreement of the 27th of *June* 1806, and that variations had been made from that agreement with respect to the premises intended to be leased to Miss *Linwood*, and that differences had arisen between Miss *Linwood* and Mr. *Page* upon that subject, — it was agreed, that the buildings intended for Miss *Linwood* should be completed according to certain plans and specifications annexed to that agreement, on or before the 1st of *January* 1809, or so soon after as Mr. *Boyd* should certify that they might be completed, if due diligence were used; that, within seven days afterwards, all parties should join in a lease to Mr. *Page* of the ground, premises, and buildings intended to be leased to him by the agreement of the 27th of *June* 1806, with such variations as had taken place in the formations of any such buildings, for a term of forty-eight years from the 29th of *September* 1807, at the rent and subject to the covenants specified in the first agreement;

ment; and that thereupon Mr. *Page* should grant a lease to Miss *Linwood* for a term of forty-seven years and three quarters, wanting ten days, from the 25th of *December* 1807, at the annual rent of 250*l.*, and should be paid the 1000*l.* by Miss *Linwood* by four half-yearly instalments, commencing on the 25th of *March* 1809, with interest: and Miss *Linwood* then engaged to regrant to Mr. *Page* the rooms over her exhibition-rooms, and also a cellar for her term therein, wanting ten days, at a pepper-corn rent.

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On the construction of this agreement a question has also been made, — whether the lease here agreed to be granted to Mr. *Page* was a lease of all the new buildings comprised in the agreement of the 27th of *June* 1806, or of that part only which were to be leased to Miss *Linwood*. The words of this agreement are clear and explicit, that all parties are to grant to Mr. *Page* a good lease of the ground, premises, and buildings, agreed by the recited agreement of the 27th of *June* 1806 to be leased to him: and there does not appear to be any sufficient ground for the limited construction contended for.

On the 29th of *March* 1809, Mr. *Boyd* certified that the works agreed to be done by Mr. *Page* for Miss *Linwood's* rooms were completed, and that Mr. *Page* was therefore entitled to his lease, according to the agreement of the 21st of *November* 1808.

It appears by the evidence of Mr. *White*, that, in 1809, after the certificate of Mr. *Boyd*, and, as it should seem, about the month of *May* or *June*, drafts of the several leases, which were necessary to give effect to the agreement of the 27th of *June* 1806 and the subsequent agreements, were prepared by Messrs. *White* and

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and *Fenner*, as solicitors for Mr. *Willows*, and, on the 16th of *March* 1810, were sent by them to Messrs. *Windus* and *Holloway*, as solicitors of Mr. *Page*. Some objections appear to have arisen on the part of Mr. *Page*, which he afterwards abandoned; and, on the 30th of *August* 1812, the drafts were returned as approved by Messrs. *Windus* and *Holloway*, on the part of Mr. *Page*, except as to an alteration in the draft of the lease from Mr. *Page* to Miss *Linwood*, with respect to the commencement of the term in the lease; which alteration was plainly made by mistake.

The leases remained unexecuted; and Mr. *Willows* died in 1813.

In 1814, Messrs. *Broom* and Mr. *Harris*, then their partner, became the purchasers of Mr. *Willows*'s equity of redemption. Mr. *Willows* is stated to have died intestate; and the conveyance to Messrs. *Davey*, as trustees for Messrs. *Broom* and *Harris*, was executed by *John Willows*, his heir at law, and also by his mother *Eleanor Willows* and his two sisters *Barbara Willows* and *Jane Willows*. The considerations to be paid to these persons being charged upon the premises, they were made parties Defendants to the bill, which was filed in the year 1818 for the purpose of compelling the execution of the several leases to be granted to and by the Defendants, and for the accounts consequential thereto.

It appears by the evidence of Mr. *Boyd*, that plans and specifications of the several works to be done by Mr. *Page*, in pursuance of the agreement of the 27th of *June* 1806, were prepared by him, although they are not now produced; that Mr. *Page* rendered, not half-yearly, but quarterly accounts; and that the value of the works included in such accounts was ascertained
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by Mr. *Page* and Mr. *Boyd*, who signed the same. These accounts were, according to the agreement of *June* 1806, produced to Mr. *Willows*, who signed nine certificates in acknowledgement of the correctness of the accounts; and by the last of such certificates, which was dated on the 10th of *July* 1810, he admitted, that, on the 25th of *March* 1809, there was due to Mr. *Page* a sum of 13,291*l.* 1*s.* 6*d.*, with interest from that day.

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It will be observed, that Miss *Linwood* and Messrs. *Broom* were necessary parties to the agreement of the 27th of *June* 1806, not merely as intended lessees of parts of the premises to be built by Mr. *Page*, but as mortgagees whose concurrence was necessary to the legal validity of any lease to be granted to Mr. *Page*; and, more especially, because the two rents of 250*l.* and 200*l.*, which were to be paid to Mr. *Page* by Miss *Linwood* and Mr. *Willows*, would have priority over the 6000*l.* mortgage, as to the premises to be comprised in the lease to Mr. *Page*. Neither Miss *Linwood* nor the Messrs. *Broom* were parties to the subsequent contracts, by which an additional 200*l.* a year was to be paid to Mr. *Page*, and by which an additional term of fifty years was to be granted to him. In their character of mortgagees they are, therefore, *primâ facie* entitled to say, that the demand of the Plaintiff must be dissected and separated into two parts; and that the part which arises out of the agreement of the 27th of *June* 1806, to which they are parties, is alone to be paid out of the 450*l.* a year in priority to their mortgage, and that, as to that part which arises out of the matters not comprised in the agreement of the 27th of *June* 1806, their mortgage has priority to Mr. *Page's* demand.

It is admitted by Mr. *Page*, that to make this dissection of the accounts would be a matter of great expense and

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and difficulty: and, in order to avoid it, as regards Miss *Linwood*, it has in the progress of the cause been agreed, that the Plaintiff shall become the purchaser of Miss *Linwood's* moiety of the mortgage, so that she may no longer have any interest in calling for that separation of the accounts. And, as to Messrs. *Broom*, it is insisted, that the rents of the premises, which have been retained or received by them, and which must be applied in satisfaction of their mortgage, have long since extinguished all their interest in that respect. Their own rent, payable to Mr. *Willows*, consists of two sums of 375*l.* and 125*l.*, making together 500*l.* a year: and, besides these rents retained by them for twenty years, they appear to have received considerable sums for rents due from other tenants. Messrs. *Broom*, however, do not admit that their mortgage debt of 3000*l.* is satisfied; and the fact will necessarily be matter of inquiry before the Master. If, upon his report, it should appear that any thing remains due upon the mortgage, it will come to be considered, upon further directions, what is to be done as to the separation of the accounts.

Messrs. *Broom* and *Harris*, or those who now represent them, do, in their character of assignees of Mr. *Willows's* equity equity of redemption, stand in the place of Mr. *Willows*; and, to the extent in which the estate in question would be chargeable with Mr. *Page's* demand, if Mr. *Willows* were living, it will be chargeable with that demand in the hands of those to whom it now belongs.

For them, however, it is argued, that, if Mr. *Willows* were now living, Mr. *Page* would not be entitled to any lease, because he has not performed all the works, which, by the agreement of the 27th of *June* 1806, were to be the consideration of his lease. Mr. *Page* stipulates for

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no other payment than by the leases in question ; and if he is not entitled to the leases, he is not entitled to any payment. This is not a case in which certain specified works are to be performed for a stipulated sum ; and the party demands the stipulated sum, without having completed the works. *Mr. Page* was to be paid by measure and value for the works which he should perform ; and *Mr. Willows* has admitted that he has performed works and made payments to the amount of the sum which he demands.

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But it is said, still he has not performed all which he stipulated to do, and therefore he is to be paid for none. The fact and the law upon this point are both equally questionable. The fact, alleged in the answer of *J. Broom*, is, that *Mr. Page* did not finish the largest of the several rooms which were to be demised by *Mr. Page* to *Mr. Willows*, nor the kitchens, cellars, and passages under *Saville House* ; and that Messrs. *Broom* agreed with *Mr. Willows* to become tenants of the rooms which were to be demised by *Mr. Page* to *Mr. Willows*, at the same rent of 200*l.*, which *Mr. Willows* was to pay to *Mr. Page*, and also to become tenants of the kitchens, cellars, and passages under *Saville House*, at a rent of 125*l.*, on condition that *Mr. Willows* should allow them the expense of finishing them ; and that they did accordingly expend in finishing those several premises the sum of 300*l.* And the argument is, that *Mr. Page* ought to have done these works, and, because he has not done them, is not to have his lease.

With respect to the kitchens, cellars, and passages under *Saville House*, it is plain that they were not included in the agreement of *June* 1806 ; and, admitting that they were unfinished, it could not touch the present question. With respect to the large room, of which

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Mr. *Broom* speaks, it appears that Mr. *Willows* let it, in 1807, to a Mr. *George Humphray*, who occupied it in its unfinished state as a warehouse, and that he was succeeded in his tenancy by Messrs. *Broom*. The inference therefore is, that Mr. *Willows* did not require Mr. *Page* to finish it. Being able to make a profit of it in its unfinished state, he let it to Mr. *Humphray*; when he afterwards let it to Messrs. *Broom*, he seems to have considered it to be more convenient that they should finish it for themselves, than that Mr. *Page* should interfere; and to his interest it was indifferent, whether the works were done by Mr. *Page* or Messrs. *Broom*. But, even as to this room, it appears that Mr. *Boyd*, being examined by Messrs. *Broom* upon this point, states, that the basement story in the new buildings, and a large room and certain lobbies and passages in the roof were left unfinished; and that, if Mr. *Page* were bound to finish them before he had his lease, he was not entitled to his lease; but that such basement room, lobbies and passages were not included in the specifications prepared by him, *Boyd*, and referred to in the agreement of *June* 1806. The basement story spoken of by Mr. *Boyd* is the large room mentioned by *J. Broom* and referred to by Mr. *Boyd*; and, if it was not included in the specification, then there was in the agreement of *June* 1806 no contract on the part of Mr. *Page* to finish them; and the circumstance of this room being unfinished does not touch the present question.

It is stated in the answers of *J. Broom* and *Harris*, and in the evidence of Mr. *Boyd*, that Mr. *Page* left unfinished certain apartments in the upper part of *Saville House*; but the agreement of *June* 1806 did not include these apartments, or the works to be done in them; and this fact, therefore, does not bear upon the point. Thus it is not established, that Mr. *Page* did
leave

leave unfinished any part of the works specified in the contract of *June 1806*.

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But if it were so, and Messrs. *Broom* had actually expended 300*l.* in works, which ought, by the agreement of *June 1806*, to have been performed by Mr. *Page*, would that, in a court of equity, form a reason why Mr. *Page* should not be paid any part of the admitted amount of his demand upon Mr. *Willows*? The doctrine of a court of equity is — not forfeiture — but compensation; and, in such a case, all that could be asked by the Defendants would be, that they should be put in the same situation as if Mr. *Page* had performed the works to the extent of 300*l.*, viz. that Mr. *Page* should repay the persons who had performed the works, and should add the sum to his account.

In truth, however, neither the fact nor the law upon this point are of much importance in this case. By the agreement of the 21st of *November 1808*, Mr. *Willows* expressly admits Mr. *Page*'s title to his lease, when the works therein specified were completed; those works appear by Mr. *Boyd*'s certificate, and are admitted, to have been duly completed: and in the drafts of the leases, which were prepared by Messrs. *White* and *Fenner* on the part of Mr. *Willows* in 1809, and sent to the solicitor of Mr. *Page*, it is expressly recited, that all the works contracted to be done by Mr. *Page* had been duly performed. The *Brooms*, if their mortgage debt be satisfied, stand only in the place of Mr. *Willows*, and are consequently bound by his admission.

It must therefore be declared, that the Plaintiff Mr. *Page* is now entitled to have the several leases executed according to the drafts prepared by Mr. *White* in 1809, and approved on the part of Mr. *Page*; with this dif-

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ference, that the lease, intended to have been made by Mr. *Page* to Mr. *Willows*, is to be made to the *Brooms*, who, by agreement with Mr. *Willows*, are entitled to it; and with this further difference, that the lease to Mr. *Page* must be made for the additional term of fifty years, provided it shall appear that the mortgage debt to the *Brooms* is satisfied.

With respect to Miss *Linwood*, the only question is as to interest on the principal sum of 1000*l.* to be paid by her to Mr. *Page*. This 1000*l.* is nothing more than part of the price by which she purchased her lease; and, having been in possession of the property purchased, it necessarily follows that she must pay interest on the price at the rate of 4 per cent. An account must be taken of the principal and interest of the 1000*l.*, from the respective times when the instalments were to have been paid, according to the draft of lease prepared by Messrs. *White* and *Fenner*, and also an account of the rent of 250*l.* which has accrued due from Miss *Linwood* according to such draft, making all just allowances to Miss *Linwood*.

An account must also be taken of the principal and interest now due upon the mortgage: it being agreed that the Plaintiff shall take an assignment of the mortgage, let the difference between the amount of the mortgage money and the amount of the account of rent be paid by the Plaintiff to Miss *Linwood*, or by Miss *Linwood* to the Plaintiff, according to the result of those accounts; let all proper parties join in the assignment of the mortgage to the Plaintiff, as the Master shall direct; and let the Master settle the necessary deed or deeds of assignment, in case of a difference between the parties.

With.

With respect to Miss *Linwood's* costs, let the same be taxed, and paid by the Plaintiff.

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The Plaintiff, Mr. *Page*, under the deed poll of the 26th of *November* 1807, is entitled to a charge upon the premises for the purpose of supplying the deficiency, if any, of the rent of 200*l.* to be reserved in his lease to Messrs. *Broom*, and also for the payment of an additional 200*l.* a year during the term of forty-eight years, or until his whole demand is satisfied. It does not appear to me that Mr. *Page* is entitled to this charge for the additional term of fifty years: and it must be referred to the Master to settle a proper deed for that purpose, to be executed by all proper parties; but such charge must be postponed to Messrs. *Brooms'* mortgage, if it be not satisfied. In case it should appear that Messrs. *Brooms'* mortgage is satisfied, then it must be referred to the Master to compute what is now due to Mr. *Page* for principal and interest, at 5 per cent., on the sum of 13,290*l.* 1*s.* 6*d.* from the 25th of *March* 1809, according to the acknowledgment of Mr. *Willows*, which bears date on the 19th of *July* 1810: but if the Master is of opinion that Messrs. *Brooms'* mortgage is not wholly satisfied, then this account must be reserved for further directions.

Mr. *J. Broom* complains in his answer, that there are excessive charges in the account, and complains especially of charges for commission and compound interest, and that Mr. *Willows* had not credit for sums to which he was justly entitled. But the acknowledgment of Mr. *Willows* amounts to a settled account; and a settled account cannot be opened or surcharged and falsified by such general statements in an answer.

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The Messrs. *Brooms* will have to account with the Plaintiff for the 200*l.* a year to be reserved in the lease from the Plaintiff from the 25th of *December* 1807, being the commencement of the term according to the draft prepared by Messrs. *White* and *Fenner*. Mr. *J. Broom*, Mr. *Harris*, and Mr. *Rosser*, must account for their several receipts and payments, in respect of the parts of the estate which are not comprised in the lease from Mr. *Page* to Miss *Linwood* and the *Brooms*. Mr. *Page* has an interest in this account, first, because, from the result of this account, the mortgage due to Messrs. *Broom* is to be discharged; and, next, because, after the mortgage-money due to the *Brooms* is discharged, he will be entitled to have the principal and interest of the mortgage debt, assigned to him by Miss *Linwood*, also discharged. He would be entitled to have this mortgage-money discharged rateably with the mortgage-money due to the *Brooms*; were it not that he waives that right, with a view to be relieved from the difficulties of dissecting his, Mr. *Page's*, accounts into two parts. Mr. *Page* has next an interest in this account in respect of the additional 200*l.* a year; which he will have a right to claim, at all events, after the full satisfaction of the mortgage debts. In this account will be included the rent of 375*l.* reserved in the lease of the 2d of *August* 1806, and the rent of 125*l.* agreed to be paid to Mr. *Willows* for the kitchen, cellars, and passages under *Saville House*, from the 16th *November* 1808. In taking this account the parties must have all just allowances.

It is said in the answers of Mr. *J. Broom* and Mr. *Harris*, and is, indeed, proved by Mr. *Boyd*, that Mr. *Page* for some years retained possession of several rooms in *Saville House*, and that Mr. *Willows* thereby lost the opportunity of letting them. If Mr. *Page* could not account for this, and were liable to make compensation
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to Mr. *Willows* in respect of it, yet that could not benefit the Messrs. *Brooms*. It would be a demand on the part of the personal estate of Mr. *Willows* only : and, as this suit is framed, I cannot direct any inquiry respecting it.

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It is stated in the answers of Mr. *J. Broom* and Mr. *Harris*, that the mother, brothers, and sisters of Mr. *Willows* had claims upon Mr. *Willows*'s property in priority to the Plaintiff. If they can establish that fact, and that they have properly made payments in respect thereof, they will be entitled to claim such payments under the head of just allowances. As regards the costs of these parties — if their original claims, in respect of which their annuities were granted, are prior to the Plaintiff's, and no relief is asked against them, the bill must be dismissed with costs as against them, to be paid by the Plaintiff. The Plaintiff has a right, if he pleases, to an inquiry, whether their original claims were or not prior to his rights; and if they should turn out to be subsequent, the Plaintiff will not have to pay their costs.

The Defendants, the *Daveys*, being mere trustees in the purchase by the *Brooms*, are not entitled to claim their costs from the Plaintiff. They must claim them from their *cestuisque trust*.

The Defendants *Sutton*, *Sankey*, and *Hanbury*, were made parties by the Plaintiff, on the notion that they were subsequent incumbrancers. They appear, if incumbrancers at all, to be prior incumbrancers; and the Plaintiff, praying no relief against them, must pay their costs.

The costs of Mr. *Rosser*, who is an accounting party, must be reserved until after the report.

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My opinion is, that the *Brooms* and *Harris*, as representing Mr. *Willows*, ought, without suit, to have conceded to the Plaintiff's demands; and the inclination of my opinion is, that they must pay the Plaintiff his costs, and repay him the costs to be paid by him to Miss *Linwood*. But, as the result of the mortgage account of Messrs. *Broom* may affect this question, I will reserve the consideration of costs as between the Plaintiff and the Defendants Messrs. *Broom* and *Harris*, until after the Master shall have made his report.

Under the very special circumstances that have led to three hearings in this suit*, I think, I could not give to the Plaintiff, as against the *Brooms* and *Harris*, the costs of more than one hearing.

With respect to the question, whether the *Brownings* were necessary parties, in respect that Mr. *Willows* had directed that Messrs. *White* and *Rosser*, the receivers of his estate, should pay interest on their mortgage after certain other payments, I am of opinion that, this direction being made without their privity, and without consideration on their part, it was not binding on Mr. *Willows*, and that they are not necessary parties to the receivers' accounts.

With respect to the appointment of a receiver, the consideration must be reserved till after the Master's report. Whether the mortgage debt assigned to the Plaintiff is or not discharged, and whether the additional sum of 200*l.* a year is made a legal or equitable charge, will have great weight on that question.

* It had been contended on least one of the two former in the part of the Plaintiff, that he effectual hearings, in addition to ought to have the costs of at the costs of the present hearing.

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HAMBROOKE v. SIMMONS.

ROLLS.
Nov. 20.

THE question in this cause was, whether the testator had or had not given the title-deeds relating to a mortgage debt of 600*l.*, due to him from one *James Pol-lard*, by way of *donatio mortis causâ*, to one of the De-fendants ?

Quære, Whe-
ther a *donatio*
mortis causâ is
avoided by the
fact, that a
will or codicil
is subsequent-
ly made? —
Whether a
remainder
may be limited
on a *donatio*
mortis causâ?
— Whether,
the *donatio*
mortis causâ
being of a
mortgage
debt, a gift of
the same sum,
with the same
remainder
over, in a sub-
sequent codi-
cil, is to be
considered a
satisfaction?

The Defendant, who claimed the gift, stated, that the testator had annexed to it the condition that the mort-gagor was not to be troubled during his life for either principal or interest, and that, at the death of the donee, the 600*l.* was to go to her children. The gift was alleged to have been made about the 1st or 2d of *March* 1819; and, on the 15th of that month, the testator made a regular codicil with professional assistance, by which he gave the like sum of 600*l.* for life to the Defendant claiming the *donatio mortis causâ*, with remainder to her children. On the 18th of *March* he made a second codicil; and in neither of the codicils was there any notice taken of this alleged donation of the mortgage. He died about the middle of *April*.

Two witnesses stated, that, after making the first codicil, the testator declared that he had thereby done something more for the donee of the mortgage.

Mr. Sugden and *Mr. Beames*, for the Plaintiff.

It is impossible to place any reliance on the evidence which has been adduced by the alleged donee. If the testator had made a gift of the mortgage to her, it is extraordinary that he should not have alluded to it in either of his codicils, and that he should not have made any mention of it to the attorney who drew these testa-mentary instruments. There are various points, also, in which

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which there are discrepancies between the answers and the depositions. A *donatio mortis causá* ought to be established by clear evidence; here the case stated is utterly improbable, or, at least, accompanied with circumstances of the most suspicious character. These imperfect dispositions are sanctioned by the law only from indulgence to a party who is *in extremis*; and, to be valid, such gifts must be made in apprehension of death. Here the alleged gift took place six or seven weeks before the death of the testator; and there is no evidence that at that time his life was in danger. Besides, this is represented as a gift not to the donee absolutely, but to her for life, subject to the condition of not requiring the interest from the mortgagor during his life, and with remainder, after her death, to her children. Now a *donatio causá mortis* cannot be coupled with a condition or made subject to a trust.

Mr. *Horne*, *contra*.

There is direct evidence in support of the gift; and the discrepancies are only in minute circumstances, in which different persons, telling the truth without concert, will be generally found to vary a little from each other. The gift was made in the last illness of the donor and in contemplation of his death; which is sufficient to support it.

Mr. *Boteler*, on the same side.

The allegation that it is essential to the validity of such a gift that it should be made *in extremis* or in apprehension of death, is contrary to law. "*Mortis causá donatio est quæ propter mortis fit suspicionem.*" (a) Equally groundless is the assertion that a *donatio mortis causá* cannot be coupled with a condition, or made subject to a trust. In *Drury v. Smith* (b) the deceased had,
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(a) Inst. lib. ii. tit. 7. s. 1

(b) 1 P. Wms. 404.

in his last illness, given a bill to a person for the purpose of being delivered, in the event of the donor's death, to his nephew; and Lord Cowper held that the gift to the nephew was valid. In *Blount v. Burrow* (a) Lord Commissioner Eyre said, "it being for a particular purpose did not prevent its being a *donatio mortis causa*." According to the civil law, a *donatio mortis causa* may be made subject to a trust or a condition. "Eorum, quibus mortis causa donatum est, fidei committi quoque tempore potest: quod fideicommissum heredes, salva Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fideicommisso teneatur, fideicommissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majore pecunia præstari non dubiè voluit integra." — *Dig.* lib. xxxi. tit. I. 77. 1. "Ab eo, qui neque legatum neque fideicommissum neque hereditatem vel mortis causa donationem accepit, nihil per fideicommissum relinqui potest." — *Cod.* lib. vi. tit. 42. l. 9.

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The MASTER of the ROLLS,

After commenting upon the evidence, and stating that there was great doubt as to the facts, directed an issue in the following words: "Whether the testator made any gift by way of *donatio mortis causa* of the mortgage debt due to him from *James Pollard*:" the Judge to be at liberty to indorse any special matters upon the *postea*.

The MASTER of the ROLLS observed, that this form of issue would leave the question of law, as well as of fact, to the consideration of a court of law.

(a) 4 Bro. C. C. 75.

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ROLLS.

Nov. 20.

HODGES v. GREEN.

A conveyance of an estate to trustees, upon trust to sell for payment of debts, is not a revocation of a prior will, because it declares that the surplus monies arising from the sale shall be personal estate of the testator; but if it have the further purpose to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife will be entitled to the annuity, after the death of the husband, if the sale do not take place in his lifetime.

THE question in the cause was, Whether the will of the testator was revoked as to a particular estate by a deed subsequently executed.

In 1806, *William Hodges* made his will, devising all his real estates. By indentures of lease and release, dated in *December* 1811, he conveyed certain estates in *Oxfordshire* to *Charles Green* and *George Green*, and their heirs, upon trust for sale or mortgage, and to apply the money to arise from such sale or mortgage in payment, first, of an old mortgage debt of 8000*l.*; secondly, of scheduled debts; and then, after retaining whatever might be due to them for expenses, &c., of a recent mortgage debt of 5000*l.* In the release it was further declared, that, as to the residue or surplus of monies to be received from a sale, the trustees should stand possessed of the same in trust for the testator, his executors, and administrators as personal estate; and that, as to such part of the premises as should not be sold, the trustees should stand seised of it in trust for the testator, his heirs, and assigns: and power was given to *Charles Green* and *George Green*, until a sale should take place, to demise the premises, and to fell timber. The deed further provided, that, in the meantime, and until a sale was effected, the trustees should receive the rents and profits, and the money arising from the sale of timber, and should apply the same in payment, first, of the interest on the mortgage of 8000*l.*, and, in the second place, of an annuity of 750*l.* a year to *Catherine Hodges*,

Hodges, the testator's wife, for her sole and separate use, and free from the debts or control of Mr. *William Hodges*. The next trust was, for discharging the interest on certain other debts; and the residue of the money, if any, was to be applied in payment of the principal of the debts. The deed contained, likewise, a covenant for further assurance by the testator and his heirs.

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Mr. *Hodges* died within fourteen months after the execution of the deeds of *December* 1811. No part of the estate had been sold during his lifetime.

The wife was entitled by her marriage settlement to an annuity of 800*l.* a year, after the death of the husband.

The bill was filed by the heir at law, who insisted that the deeds of *December* 1811 were, as to the estates comprised in them, a revocation of the will.

Mr. *Sugden* and Mr. *Phillimore*, for the Plaintiff.

A conveyance, which goes beyond the purpose of a mere mortgage, or of making a provision for the payment of mortgages and debts, is a revocation of a prior will. Here the testator's power of disposition over the property is varied in essential particulars. An annuity, charged upon the lands, until a sale shall have taken place, is given to the separate use of his wife; the trustees have power to grant leases and to fell timber; and the satisfaction of this annuity is one of the first purposes to which the rents of the land and the proceeds of the timber are to be applied. Suppose the deed of 1811 had conveyed the estate to trustees upon trust to sell, and, in the meantime, out of the rents and profits to pay to the wife this annuity of 750*l.* a year, who can doubt that it would have

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have been a revocation of the will? Can it be less operative as a revocation, because, along with that purpose, other purposes are conjoined, which, by themselves, would not have revoked the will?

The nature of the testator's interest in the property is materially changed by this deed. The surplus monies arising from the sale are to go to him, his executors, and administrators, and to be part of his personal estate; so that the very subject-matter, on which the will was to operate, is totally altered in its character, and thrown into a new line of transmission. *Vann v. Barnett.* (a)

Mr. *Pepys* and Mr. *Pemberton*, for some of the Defendants.

The true question is, Whether the deeds of 1811 contain any provision, by which there is manifested, or from which there must be presumed, an intention to revoke the will? There might have been some ground for the argument of the Plaintiff, if these deeds had provided for purposes which were to be answered, after the debts were satisfied. But when once the debts were paid, in what respect was the interest of the testator different from what it had previously been? The surplus monies, it is said, arising from the sale, are to be part of his personal estate. But, without any express declaration to that effect, the rule of law would have made such monies personal assets. The annual payment to his wife, until a sale shall be effected, was introduced, not with a view of altering his interest in the estate, but as a part of the machinery by which the trust for the payment of debts was to be carried into effect. It was a pur-

(a) 19 Ves. 102.

a purpose subordinate and auxiliary to the main purpose of providing for the discharge of the debts, and not a distinct and ulterior object. When the sales were effected, there would unquestionably be a considerable surplus; but if in the meantime all the rents and profits were to be applied for the benefit of the creditors, his family would be left without provision. He therefore provided for the annual payment of 750*l.* to his wife, until the hereditaments should be sold. This, however, was a payment which was not intended to continue, and which, according to the words of the deed, cannot be held to have continued beyond the death of Mr. *Hodges*, and which, therefore, could in no way alter the devisable interest which his will disposed of. He contemplated an immediate execution of the trusts: the words excluding the marital power, which accompany the gift of the annuity, expressly refer to Mr. *Hodges* himself, and not to any future husband: and, under her marriage settlement, the lady, upon his death, would become entitled to an annuity of 800*l.* a year as her jointure; so that this intermediate provision would no longer be necessary. The annuity of 750*l.* would necessarily end with the execution of the trust for sale; but it was not to continue in every event, till that trust was executed. Upon the whole, the deeds of 1811 have no purpose beyond that of providing for the payment of debts and incumbrances, and there is nothing in them to affect the will.

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Mr. *Horne* and Mr. *Pooley*, for Defendants in the same interest, cited, in support of the will, *Vernon v. Jones* (a), *Earl Temple v. The Duchess of Chandos* (b), and *Harwood v. Oglander*. (c)

Mr.

(a) *Prec. in Cha.* 32. *Free-* (b) 3 *Ves.* 685.
man, 117. 2 *Vern.* 241. 1 *Eq.* (c) 8 *Ves.* 127.
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Mr. Sugden, in reply.

As the annuity of 750*l.* is given to *Catherine Hodges* without any limitation of time, except that of the execution of the trust to sell, it would continue after the death of *William Hodges*, if the estates were not sold in his lifetime; and, being given to her separate use, the marital power of any future husband would necessarily be excluded. It is true, that the rules of law would have made the surplus monies his personal estate, if the contracts for sale had been entered into in his lifetime; but, under the deed of *December* 1811, these surplus monies may be claimed by his personal representative, although the sales were not made till after his death; so that the effect of the conveyance is, to give to the personal representative what would otherwise have belonged to the heir.

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Was of opinion, that the direction, that the residue of the monies arising from the sale should be personal estate, was not a purpose beyond the payment of debts so as to revoke the will, but was the mere expression of that which would be a consequence of law from the execution of the trust: for, if there was a residue of money, there would be a resulting trust to the testator of personal estate — and if a residue of land, a resulting trust of real estate: but that the annuity to the separate use of the wife would continue after the death of the testator, if the estates were not sold in his lifetime, and was plainly, therefore, a purpose beyond the payment of debts, and would revoke the will: and he made a declaration accordingly. (a)

(a) *Fawser v. Jeffery*, 16 *Ves.* 519. 3 *Russell*, 479.

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THIS was a bill by surviving executors against the personal representative of a deceased executor, praying the repayment of a sum of money which the deceased executor had retained as for his commission on business done in the affairs of the testator.

An agent, named executor, is not entitled to charge commission on business done subsequently to the testator's death.

The testator was captain of an *East India* ship. The deceased executor was in the habit of acting as a commission agent with respect to *East India* goods; and had, under a power of attorney, acted in the affairs of the testator. The commission was claimed partly on monies which had been received by the deceased executor in the lifetime of the testator; partly on monies which had been received after the death of the testator, but in respect of sales made through the agency of the executor in the lifetime of the testator; and partly on monies received after the death of the testator, where the sales had also taken place after the testator's death, though the agency had commenced in his lifetime.

The Plaintiffs attempted to prove from a correspondence between the deceased executor and the testator, that the executor had undertaken the agency as a matter of friendship, and that no commission could therefore be charged. But as to this point,

The MASTER of the ROLLS held, that the inferences from the correspondence were much too slight to deprive the deceased executor of his *prima facie* right to

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commission: and, as to the other points, his Honor declared, that the deceased executor was entitled to commission on all monies received and paid by him prior to the death of the testator; and that, as to all monies received or paid by him subsequently to the death of the testator, he was entitled to be paid for any trouble taken by him before the death of the testator in regard thereto, at the same rate that any other agent would be entitled to be paid for such trouble, according to the usual course of mercantile employment: and he referred it to the Master to take the account accordingly.

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Where legacies are given upon trust to accumulate the interest and dividends, such accumulated interest and dividends will not pass by a gift over of the principal sums, unless the Court is satisfied, by a reference to other clauses of the will, that the interest and dividends were omitted in the gift over by clerical mistake.

SAMUEL GOMOND, by his will, bearing date the 8th of June 1816, devised and bequeathed all his freehold and leasehold estates, and all his personal property to *Charles Gomond Cooke, William Danson, and Christopher Northcote*, their heirs, executors, and administrators, upon trust to convert the same into money; to discharge, out of the proceeds, his funeral and testamentary expenses, his debts, and various legacies, amounting in the whole to about 10,543*l.*, among which were legacies of 500*l.* to *Elizabeth Herring*, and of 600*l.* to her children; and to invest the residue of the monies on government or real securities. Out of the dividends and

A transaction cannot be considered as a family arrangement, where the doubts, existing as to the rights alleged to be compromised, are not presented to the mind of the party interested.

A defect of parties may be cured at the hearing, by the undertaking of the Plaintiff to give full effect to the utmost rights which the absent party could have claimed, those rights being such as do not affect the rights of Defendants.

and interest of this fund there was to be paid to his wife, *Mary Gomond*, a clear annuity of 1050*l.*, over and above a sum of 150*l.* a year, which was secured to her by her marriage settlement; and if the dividends and interest were not sufficient for that purpose, so much of the principal, as might be necessary, was to be appropriated to the satisfaction of the annuity. Subject to this charge, the testator gave his residuary estate unto and equally between and amongst the children of *Charles Gomond Cooke*, *Richard Gomond*, and *Elizabeth Herring*, the same to be paid and assigned when and as soon as the youngest of such children should have attained the age of twenty-one years; but the interest and dividends thereof were, in the mean time, to be paid and applied for their respective use and benefit. He further directed, that, in case any person, claiming to be benefited under his will, should contest or dispute its validity, or otherwise disturb his executors in the execution thereof, the bequest given to such person should be null and void, and should sink into the residue: and he appointed *Charles Gomond Cooke*, *William Danson*, and *Christopher Northcote*, his executors.

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The testator died in *May* 1819. *Charles Gomond Cooke* had only one child, a daughter; *Richard Gomond* had four children; and *Mrs. Herring* had six children. At the institution of the suit all these children had attained twenty-one.

Edmund Gomond, the father of *Samuel Gomond*, had died in 1784. As no will was produced, he was supposed to have died intestate; and *Samuel Gomond*, as his only child and sole next of kin, had obtained administration to him, and taken possession of all his property. But, a short time after *Samuel's* death, there was found in one of the secret drawers of a bureau, a will of his father

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Edmund Gomond, which bore date the 10th of September 1783.

By this will the testator, after devising a leasehold house to his son, with limitations over, gave his brother, *Thomas Gomond*, a specific sum of 5000*l.* four per cent. consolidated bank annuities, another specific sum of 5300*l.* three per cent. consolidated bank annuities, and a sum of 3000*l.* which he had at interest on a mortgage of the estate of Lord *Clifford*, upon trust to receive the interest and dividends of these sums, and apply such parts thereof, as he in his discretion should see fit, in the maintenance and education of all or any of the children of his son *Samuel Gomond*, until they should respectively attain the age of twenty-one years, or be married, with such consent as was therein mentioned; and, upon further trust, to place out the surplus of such interest and dividends at interest on government or freehold securities, so as to accumulate for the benefit of the persons to whom the same was thereafter bequeathed. He then proceeded to direct, that "the said principal sums, and the accumulated interest thereof" should be paid to such one or more of the children of his son *Samuel*, as should attain the age of twenty-one years or day of marriage with consent, subject to a power of appointment in the father.

"But," continued the testator, "if there shall not be any child or children of my said son *Samuel*, or, being such, they shall all happen to die without attaining as aforesaid, then I give and bequeath the interest, dividends, and produce of the same principal sums, unto the said *Thomas Gomond* for his life, for his own use and benefit, and from and after his decease, then in trust that the executors or administrators of the said *Thomas Gomond* do and shall pay the interest, dividends, and profits

profits of the same principal sums unto the said *Mary*, the daughter of the said *Thomas Gomond*, for and during the term of her natural life; and from and after her decease, in trust to pay and apply such parts of the interest, dividends, and produce of the said principal monies, as he the said *Thomas Gomond*, his executors or administrators, shall see proper, in the maintenance and education of all and every the children of my said niece *Mary Gomond*, until they shall respectively attain their age of twenty-one years, or be married with such consent as aforesaid, and to place out the surplus of such interest, dividends, and produce, as the same shall be received, at interest on government or other freehold security, for the benefit of the persons to whom the same is hereafter bequeathed, and in trust to pay the said principal sums, and the unapplied interest thereof, unto such one or more of the children of my said niece *Mary Gomond* who shall live to attain the age of twenty-one years, or day of marriage with such consent as aforesaid, in such parts, shares, &c., as she the said *Mary Gomond* by any deed or writing, &c. shall appoint; and in default of such appointment, &c., in trust to pay and divide the said principal sums unto and amongst all and every the child and children of the said *Mary Gomond* who shall live to attain the age of twenty-one years, or day of marriage with such consent as aforesaid, &c.: and if there shall not be any child or children of my said niece *Mary Gomond*, or, being such, they shall all happen to die without attaining as aforesaid, then in trust to pay one-fourth part of the said principal monies unto my nephew *Charles Cooke*, his executors or administrators; and in trust to pay one-fourth part of the said principal monies unto my nephew *Richard Gomond*, his executors and administrators; and in trust to pay one other fourth part of the said principal monies unto my brother *Walter Gomond*, his exe-

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cutors or administrators; and in trust to pay the remaining fourth part of the said *principal monies* unto my sister Mrs. *Elizabeth Rowley*, her executors or administrators: and it is my will, intent, and meaning, that so much money as shall have been allowed by the said *Thomas Gomond*, his executors or administrators, towards the maintenance and education of any of the children of my said son and my said niece *Mary* respectively, more than shall have been advanced towards the maintenance and education of the others of such children, shall be deducted and allowed out of the parts of such children respectively in the said trust monies, when the same shall become payable, so that all their shares in the said trust monies may be thereby made equal."

The testator further gave the sum of 2000*l.* upon trust to pay the dividends to his son *Samuel* during his life, and, after his decease, to pay the principal, with the accumulated interest, to such of *Samuel's* children as attained twenty-one or married with consent; and, if there were no such children, to pay one fourth of the principal monies to *Charles Cooke*; another fourth part, to *Richard Gomond*; another fourth part, to *Walter Gomond*; and the remaining one fourth, to *Elizabeth Rowley*. He likewise gave *Elizabeth Rowley* the interest of 200*l.* during her life. The residue of his property he bequeathed to his son *Samuel Gomond*, and appointed him his executor.

Thomas Gomond, *Charles Cooke*, *Walter Gomond*, *Richard Gomond*, and *Elizabeth Rowley* all survived *Edmund Gomond*, and all died in the lifetime of *Samuel Gomond*.

Samuel Gomond had intermarried, after his father's death, with his cousin *Mary Gomond*, the daughter of *Thomas*; but there never was any issue of the marriage.

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She survived him; and, in 1819, was about fifty-six years of age. Her father, *Thomas Gomond*, had died in 1794.

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At *Samuel's* death, the rights of *Charles Cooke* under the will of *Edmund Gomond* were vested in his son and personal representative, the Defendant *C. G. Cooke*; those of *Richard Gomond*, in his personal representative *Susannah Gomond*; and those of *Walter Gomond* and *Elizabeth Rowley*, in *Ann Rowley*, who was the personal representative of both. Subject to *Mary Gomond's* life interest, and the contingent limitations to her children, these three persons, in the events which had happened, were entitled to the benefit of the bequest contained in the ultimate disposition of the specific sums of stock and of the mortgage debt: and they were further entitled to the legacy of 2000*l.*

Upon the discovery of the will of *Edmund Gomond*, *C. G. Cooke* procured the letters of administration of *Edmund's* estate, which had been granted to *Samuel*, to be recalled; and he himself took out administration to *Edmund*, with the will annexed.

It was now necessary to ascertain what was the amount of the claim of *Edmund's* estate against *Samuel's* estate; and that would depend principally on the question, whether (supposing *Edmund* to have been possessed, at the time of his death, of the sums of stock and the mortgage debt which he bequeathed) the ultimate gift over passed only those sums of stock and that debt, or the stock and debt, with all the accumulations of interest during the life of *Samuel*. In October 1819, Mr. *Bell* was consulted on behalf of the executors. His opinion was, that the executors of *Samuel* could not act with safety, except under the direction of the Court; that only

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the principal of the 5000*l.* 4 per cent. stock, 5300*l.* 3 per cent. stock, and the 3000*l.* passed by the gift over; and that the accumulations of interest on them, being, in the events which had happened, undisposed of during the life of *Samuel*, went to *Samuel* as the residuary legatee. In the following *January*, Mr. *Cooke* obtained from another professional gentleman a similar opinion with respect to the construction of *Edmund's* will. *C. G. Cooke*, however, as representative of *Edmund*, claimed against himself and his two co-executors, as representatives of *Samuel*, the sum of 42,003*l.* 15*s.*; being, according to his calculation, the amount of the two sums of stock and the mortgage debt, with all the accumulations of interest and dividends from 1784. The assets of *Samuel*, exclusive of a small freehold estate, amounted to about 52,000*l.*; and, after satisfying the demand of the 42,003*l.* 15*s.*, and the legacy of 2000*l.* given by the will of *Edmund*, there did not remain a fund sufficient to answer *Samuel's* debts, funeral and testamentary expenses, and pecuniary legacies. The consequence was, that, if the claim of *Edmund's* administrator could be sustained to its full amount, the residuary legatees of *Samuel* would derive no benefit from their testator's bounty.

To make an immediate provision for Mrs. *Herring* and her family, as some compensation for what they had thus lost, and in order, as was alleged, to prevent litigation and family disputes, an arrangement was entered into in *November* 1819, between *Ann Rowley*, *Mary Gomond* the widow, *Susannah Gomond*, and *Charles Gomond Cooke*, with the assent of *Elizabeth Herring*, and such of her children as were then of age. The outline of this agreement was, that *Mary Gomond* should give up all her claims against the assets of *Edmund Gomond* and *Samuel Gomond*, on having the annuity of 1050*l.* secured to her, and receiving

ceiving the annuity of 150*l.*, to which she was entitled by her marriage settlement; that *Ann Rowley* should immediately receive one moiety of the said sum of 42,003*l.* 15*s.*, after deducting her share of the expenses and legacy duties, and should immediately transfer the sum of 10,000*l.* 4 per cent. annuities to trustees upon trust for the said *Elizabeth Herring* and her family upon certain terms; and that *Charles Gomond Cooke* and *Susannah Gomond* should, out of their proportions of the 42,003*l.* 15*s.*, satisfy all the pecuniary legacies of *Samuel Gomond*, and pay the annuity of 1050*l.* to his widow.

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Accordingly an indenture was executed, which was dated the 14th *December* 1819, and was made between *Ann Rowley* of the first part; *William Milton*, *Philip Ferdinand Christin*, and *Robert Moser*, of the second part; and *Elizabeth Herring* of the third part. It stated that *Edmund Gomond* by his will bequeathed certain specified stocks and monies due upon mortgage, upon trusts, by virtue whereof and of a release from his widow *Mary Gomond*, she *Ann Rowley* was entitled to two equal fourth parts of the said stocks and monies, and of the accumulated interest thereof; that *C. G. Cooke*, as administrator of *Edmund Gomond*, had caused an account to be stated of the demand which he had upon the estate of *Samuel Gomond* in respect of the said stocks and monies specifically bequeathed, and of the dividends and interest received thereon, together with interest for the sums received up to the decease of *Samuel Gomond*, and that the sum of 42,003*l.* 15*s.* was the total amount of such demand; that, after payment of that sum and of the other the debts and funeral and testamentary expenses of *Samuel Gomond*, the whole of his estate and effects was not sufficient to pay the pecuniary legacies bequeathed by him; and that, by reason of such claims

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as aforesaid to the accumulated sum of 42,003*l.* 15*s.*, the children of *Elizabeth Herring* would, as appeared by the recitals thereinbefore contained, be deprived of the benefit intended for them by the will of *Samuel Gomond*: in consideration whereof *Ann Rowley*, as being absolutely entitled to two equal fourth parts of the accumulated sum of 42,003*l.* 15*s.*, was desirous to make a provision for them and their mother *Elizabeth Herring*, by transferring the sum of 10,000*l.* 4 per cent. consolidated Bank annuities into the names of trustees. After these recitals, the deed proceeded to declare that *Milton*, *Christin*, and *Moser* should stand possessed of the 10,000*l.* 4 per cent. Bank annuities, which *Elizabeth Rowley* had transferred into their names, upon trust to pay an annuity of 100*l.* to *Elizabeth Herring* during her life; and subject thereto, upon trust, as to one equal sixth part, for each of her six daughters, who were to receive the dividends to their separate use during their respective lives; with remainder, on the decease of each of them, as to her share, for the benefit of her children. The deed contained also a declaration, that the provision thereby made for *Elizabeth Herring* and her issue was intended to be and should be accepted by them in full satisfaction of all claims and demands, which they or any of them had or might at any time have upon any person under or by virtue of the will of *Samuel Gomond*; for which end it was agreed, that, if *Elizabeth Herring*, or any of her six children, or their respective executors, administrators, or any husband with whom any of them might intermarry, should neglect or refuse, for the space of three calendar months after the same should have been tendered to them respectively, to execute a deed or deeds for releasing or extinguishing all such claims and demands as aforesaid, or should in the mean time attempt to enforce any such claims or demands, the provisions thereby

thereby made for every such person, who, or whose executors, administrators, or assigns, should so neglect or refuse, or so attempt to enforce such claims or demands as aforesaid, and also the provision thereby made for the child or children of such person (being a daughter of *Elizabeth Herring*), should be absolutely forfeited, and should be held in trust for *Ann Rowley*, her executors, administrators, or assigns.

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At the same time a deed of release was prepared, bearing date on the 14th of *December* 1819, and made between *Mrs. Herring* and her six daughters, of the first part, *Ann Rowley*, of the second part, and the executors of *Samuel Gomond*, of the third part. After mentioning the substance of *Samuel Gomond's* will, and the discovery of his father's will, it stated that *Charles Gomond Cooke*, as administrator of his father, had caused an account to be stated of the demand which he had upon the estate of *Samuel Gomond* in respect of divers stocks and monies specifically bequeathed in trust by the will of *Edmund Gomond*, and of the interest and dividends received thereon, together with interest on the sums so received up to the 2d day of *November* 1819, and that the sum of 42,009*l.* 15*s.* was found to be the total amount of such demand; that, after payment of such demand, and the other debts, and funeral and testamentary expenses of *Samuel Gomond*, the whole of his estate was not sufficient to pay the pecuniary legacies which he had bequeathed; that *Elizabeth Herring* and her children had agreed to accept the provision made for them by the before-mentioned indenture of the 14th of *December* 1819, in satisfaction of all their claims upon the residuary estate of *Samuel Gomond*; and that his executors had consented to pay the legacy of 500*l.* bequeathed to *Mrs. Herring*, and the legacy of 600*l.* bequeathed to her children: and it was thereby
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witnessed, that, in consideration of that provision, and of the payment of the two legacies, Mrs. *Herring* and her six daughters released *Charles Gomond Cooke*, *Danson*, and *Northcote*, from all claims or demands on the estate of *Samuel Gomond* under *Samuel's* will.

This deed was executed, at or about the time when it bore date, by Mrs. *Herring* and three of her daughters, who were then of age. *Charlotte*, another of the daughters, attained her full age in *March* 1820. She executed the release on the 28th of *April* following; and some time afterwards intermarried with the Plaintiff *Harvey*. It was executed by the other two daughters in *June* 1822, and *April* 1823.

In *May* 1820, *Mary Gomond*, the widow of *Samuel*, died.

The legacies of 500*l.* and 600*l.*, and the dividends of the 10,000*l.*, had been duly paid to Mrs. *Herring* and her daughters; and, till *June* 1823, no complaint was made of the arrangement which had been entered into, nor was any claim preferred against Mr. *Cooke* and his co-executors.

The present bill was filed by *Harvey* and his wife *Charlotte*. It alleged that, when she executed the release, she was ignorant of her rights under the will of *Samuel Gomond*, not having read either that will or the will of *Edmund*, and not having been informed of the opinion given by Mr. *Bell*; that she had not had the assistance of any professional adviser; that no accounts of the trust property had ever been rendered to her; that the instrument had not been read over or explained to her; and that she executed it under the influence of representations, that it was for her advantage to do so. The prayer was, that the will of
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Samuel Gomond might be established; that the accounts of his estate might be taken; and that the release might be declared fraudulent.

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Charles Gomond Cooke and his two co-executors, by their answers, insisted on the deeds of *December* 1819, as a valid family arrangement which had been carried into execution. They stated that *Edmund Gomond*, at the date of his will, and at the time of his death, was possessed, not of 5000*l.* 4 per cent. stock, and 5300*l.* 3 per cent. stock, but of 5300*l.* 4 per cent. stock, and 5000*l.* 3 per cent. stock; that the account, by which it appeared that 42,003*l.* 15*s.* was due from the estate of *Samuel Gomond* to that of *Edmund* in respect of the three specific bequests, had been computed by adding to the principal of the legacies the dividends of the stock and interest on the mortgage at 4 per cent., together with interest at 4 per cent. on the dividends and interest, from the times at which such interest and dividends became due; but that, upon making the calculations over again for the purpose of preparing the answer, it appeared that the amount of the claim, computed according to that principle, ought to have been only 41,961*l.* 3*s.* 1*d.*; that the sums of 42,003*l.* 15*s.* and 2000*l.* had been claimed by *Charles Gomond Cooke* against the estate of *Samuel*, and, being allowed by his co-executors, had been paid out of *Samuel's* assets; and that, after satisfaction of that demand, the real and personal estate of *Samuel* were insufficient for the payment of his debts, funeral and testamentary expenses, and pecuniary legacies, by upwards of 2000*l.* Mr. *Cooke* further stated his belief, that, either on the morning of the 28th of *April* 1820, or on the day before, he fully explained the release to the Plaintiff *Charlotte*; but he and his co-executors admitted that no accounts of the trust property had ever been rendered to her, "because she never required any
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account, being well aware that the estate of *Samuel Gomond* was insufficient for the payment of his debts, funeral and testamentary expenses, and pecuniary legacies."

It appeared from the evidence of *Mr. Rogers*, the solicitor of the executors, that, on the 28th of *April*, about the middle of the day, *Mr. Cooke* took the Plaintiff *Charlotte*, who was his niece, to the office of *Mr. Rogers* in *Bristol*, and, producing the release, stated that he had brought her there for the purpose of having the instrument executed by her and her execution attested by *Mr. Rogers*. The latter inquired, whether she was aware of the nature and contents of the instrument, or had consulted with any friend as to the propriety of executing it. She replied in the negative. *Mr. Rogers* told her, that she had better take some advice, before she executed the instrument; and she and her uncle went away with the instrument not executed.

Mr. Webb, a certificated conveyancer practising in *Bristol*, who was examined on behalf of the Defendants, stated, that, on the afternoon of the same 28th of *April*, he was sent for to the house of *Northcote* to witness the execution of the release, which was there put into his hands either by *Northcote* or by *Cooke*. Having been introduced to the Plaintiff *Charlotte*, he asked her whether she had read the deed. She answered that she had been informed what it was; and, upon his asking her whether she knew the contents and meaning of it, she said she did. *Mr. Webb* then urged her to have the deed read over, and offered to explain it to her, if there should be occasion; she replied that there was no occasion for it. He then said that he should read it over, and that it would be no additional trouble for him to read it out; but she said there was no occasion to
 read

read it out. Mr. *Webb* then, for his own satisfaction, read the deed or writing, and afterwards gave her a pen for the purpose of signing it; and before she affixed her signature, she remarked that her mother and sisters had already signed it. After she had executed it, she observed that she was very happy that so good an arrangement had been made for the family, as it would save much trouble in going to law.

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At the hearing of the cause, there was some discussion as to whether the mortgage for 3000*l.* was subsisting at the time of *Edmund's* death, and whether he left assets sufficient for the payment of the legacy of 2000*l.* But the two principal questions were the following: —

I. Whether the ultimate bequest of the three specific legacies in the will of *Edmund* passed only the principal of the legacies, or passed, along with the principal, all the accumulations of interest and dividends, till the period of *Samuel's* death.

II. Whether the rights of Mrs. *Harvey* were bound by the release.

Mr. *Sugden* and Mr. *Wakefield*, for the Plaintiffs, contended, on the first point, that the bequest over, on failure of children of *Mary Gomond*, passed only the principal of the three legacies. The bequest over, they argued, purported to give to each of the persons there named “one-fourth part of the said principal monies;” a form of expression, which occurred four successive times. Throughout the whole of the preceding bequests, the principal sums and principal monies were carefully distinguished from the accumulated interest and the unapplied interest. The first trust, as to these bequests, was to pay the principal sums and the accumulated interest to
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the children of *Samuel*; and as there was no child of *Samuel*, the dividends ought to have accumulated during his life. The next trust was, if there were no children of *Samuel* who attained a certain age, to pay the interest of the principal sums to *Thomas Gomond*; but this was a trust which could not take effect during the life of *Samuel*, and as *Thomas* died in *Samuel*'s lifetime, it had no effect at all. After the decease of *Thomas Gomond*, *Mary Gomond* was to enjoy the benefit of the three bequests: but she, like her father, was to have the interest only of the "principal sums;" and her title to the enjoyment could not commence till it was ascertained by the death of *Samuel*, that there could be no children of his to take under the prior gift. The bequest to her children, after her death, had failed. In the events which had happened, therefore, there was no disposition of the interest and dividends of these three legacies during the life of *Samuel*; and, he being residuary legatee, his estate was entitled to that interest and those dividends. *Wyndham v. Wyndham* (a), *Shaw v. Cunliffe*. (b)

If *Edmund* were considered to have died intestate with respect to the intermediate produce of the fund, the result would be the same; inasmuch as *Samuel* was the sole next of kin of his father. The only demand, therefore, which the estate of *Edmund* could have against the estate of *Samuel* at the death of the latter, consisted of the amount of the two sums of stock, and of the 3000*l.* and the 2000*l.*

Even if it were supposed, that *Thomas Gomond* and *Mary Gomond* successively were to enjoy the interest and

(a) 3 Bro. C. C. 58.

(b) 4 Bro. C. C. 141.

and dividends of the three legacies from the death of the testator, until *Samuel* had a son born, (a construction which would not be consonant either to authority or to the language of the will), still the result would be, that, from 1794 to 1819, *Samuel Gomond* was in the receipt of dividends and interest which belonged to his wife. He was entitled to receive these dividends by virtue of his marital rights; and no charge could be made against his estate in respect of them.

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It was not very important to consider the bequest to the children of *Mary Gomond*, except in so far as it might be supposed to assist the construction of the other clauses of the will. The testator did not seem to have intended that the accumulations of the interest and dividends should take place during the life of *Samuel*, except for the benefit of *Samuel's* children: the whole that the children of *Mary Gomond* were to take, consisted of the principal sums, and such portions of the surplus interest and dividends, accrued due from the time when the interest and dividends became applicable to their maintenance, as their mother should appoint; and if she made no appointment, they were to take only the principal of the legacies. But even if it should be held, that the children of *Mary Gomond* were, in the event of their becoming entitled, to take both the principal and the accumulated interest of the three legacies, it was clear that such a construction could be adopted only on the ground of a presumption in their favour arising upon the previous dispositions contained in the will. No such presumption existed in favour of the objects of the ultimate bequest over; and they could take nothing beyond what was expressly given to them.

Mr. *Horne*, Mr. *Preston*, and Mr. *Duckworth*, for
the Defendant *Cooke*.

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The interest and dividends of each legacy are directed to be accumulated for the benefit of the persons to whom the same are thereafter bequeathed. The accumulations would, probably in any event, and certainly in some events, continue during the life of *Samuel Gomond*: it is, therefore, contrary to every rule of rational construction to suppose that these accumulations were meant to be bequeathed to him; and to regard them as not disposed of would be in direct opposition to the language of the testator. After the decease of *Mary Gomond*, the principal sums, and the unapplied interest, — that is, the accumulations of interest, — were to go to her children in such shares as she should appoint: and, when the testator goes on to direct that, in default of appointment, the trustees shall divide “the said principal sums” amongst all her children who should live to attain the specified age, he must, by the “said principal sums,” mean the fund over which her power of appointment extended; that is, the original capital of the legacies, with all the subsequent accumulations, which, by investment, had been converted into principal. Then, when he proceeds in the next clause, in the event of there being no children of *Mary Gomond* who should become entitled, to give “the said principal monies” to certain other persons, he must mean to dispose of all that the children of *Mary Gomond* would have taken — that is, of the original legacies, with the accumulations of interest.

Mr. Knight, for *Ann Bowley*, adopted the same line of argument.

The MASTER of the ROLLS, in the course of the argument, stated, that he had a clear opinion on the construction of the will of *Edmund Gomond*, and that there was nothing in that will to subject the estate of *Samuel Gomond*

Gomond to payment of interest on the two legacies of stock and the legacy of the 3000*l.* due on mortgage. His Honor was of opinion that *Mary Gomond's* children, if she had had children and had made no appointment, would have taken not only the principal of these legacies, but also the accumulated interest, although, in the gift to them, the expression "principal sums" was alone used. But he came to that conclusion,—not because he thought that the testator meant under the words "principal sums" to include the accumulated interest, or that those words passed the accumulated interest,—but because, upon reference to other parts of the will, it appeared that the terms "accumulated interest" were to be considered as omitted in that clause merely by clerical mistake, and, consequently, that they were to be supplied by reference to the other parts of the will. His Honor was of opinion, that there was no reference to other parts of the will, which could authorise the Court to supply the words "accumulated interest," in the gift over to the four persons who took the principal monies in default of *Mary Gomond's* children; and, consequently, he could not supply the words there. There being nothing to which on legal principles a court could refer, in order to introduce such terms into the gift over, those, who took under the gift over, were entitled to the principal sums only, and not to the interest. In the events which had happened, *Samuel Gomond*, as residuary legatee, would take the interest upon those sums accumulated during his life; and his estate, therefore, could not be charged with interest on the three legacies.

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On the second point, which related to the validity of the release, it was argued on behalf of the *Plaintiffs*, that, having regard to the true construction of the

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will of *Edmund Gomond*, the transaction was, in the view of a court of equity, grossly fraudulent; for it proceeded on a representation that *Cooke*, as administrator of *Edmund*, had a claim on the estate of *Samuel* to the amount of 42,000*l.*, when, in truth, the utmost extent of his demand could not have exceeded ten or twelve thousand pounds. Even if *Edmund's* will were to receive the construction for which Mr. *Cooke* contended, still the claim, which he had made against *Samuel's* estate, could not be sustained. He admitted, that the sum, which had been allowed him, exceeded the whole of what could be claimed according to his own mode of estimating the demand: and that mode was, by charging compound interest upon interest and dividends, from the moment when such interest and dividends would have become payable, without the least reference to the time, when, according to the usual course of transactions, they would have been actually received.

Independently of the taint communicated to the whole transaction by setting up this fictitious demand of 42,000*l.*, the proceeding was in every step irreconcilable with the acknowledged principles of a court of equity. It was the duty of *Cooke*, as executor of *Samuel Gomond*, to have protected his testator's estate, and the rights of the residuary legatees under the will: in assuming the character of administrator of *Edmund*, he undertook to discharge incompatible duties; and, as might have been expected, the duty, which was opposed to his interest, was forgotten in the supposed duty with which his interest coincided. The Plaintiff, when she was called upon to execute the release, had recently attained her full age: no information was communicated to her with respect to her rights, except what was contained in the delusive representation, that there were

were no assets to satisfy any claim which she might have under the will of *Samuel Gomond*: the opinion of *Mr. Bell*, which would have shewn that such a representation was inaccurate, was not communicated to her: no account was ever laid before her of the assets of *Samuel Gomond*: she had no professional assistance; she acted under the influence of her uncle, whose interest was adverse to hers; and even her mother was, in substance, bribed to co-operate in bartering away the rights of her children, by having secured to her an annuity of 100*l.* a year, to which she could have no claim under *Samuel's* will.

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The Defendants affect to treat the transaction as a family arrangement. But in family arrangements, says Lord *Eldon* (a), "there must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient." Here there was neither good faith, nor honest intention, nor full disclosure.

On behalf of the principal *Defendants* it was argued, that the Plaintiff *Charlotte* had executed the release deliberately and with full knowledge of her rights; considering it to be for the advantage of herself and her family, to secure a certain benefit instead of incurring the hazards of litigation. The construction of the will of *Edmund Gomond* was at least a matter of reasonable doubt: and a family arrangement was not the less binding, because to some of the parties it did not give all that a successful adverse assertion of their claims might have procured them. No fact, which could affect the rights of the Plaintiff, was concealed from her: the opinion of *Mr. Bell* was not a fact, which could either in-

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(a) 3 *Swanst.* 477.

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crease or lessen those rights. Not only was the release executed deliberately and with full means of information; she and her husband affirmed it repeatedly by receiving their portion of the surplus dividends of the 10,000*l.* 4 per cent. stock. No claim, incompatible with the arrangement of *December* 1819, was advanced by her, till the death of *Mary Gomond* had made a great addition to the value of the interests of the residuary legatees of *Samuel Gomond*. In *December* 1819 the probability was, that *Mary Gomond* would live many years; and her annuity would have gone far to exhaust the utmost residue of *Samuel Gomond's* estate. *Mary Gomond* died; and then for the first time the Plaintiffs impeached an arrangement, to which, had the testator's widow still been alive, they would probably have been glad to adhere.

The following cases were cited: *Hotchkis v. Dickson* (a), *Davis v. Uphill* (b), *Gordon v. Gordon* (c), *Stockley v. Stockley* (d), *Stapilton v. Stapilton* (e), *Cann v. Cann* (g), *Pullen v. Ready* (h), *Cory v. Cory* (i), *Lansdown v. Lansdown* (k), *Bingham v. Bingham* (l), *Dunnage v. White*. (m)

In the course of the argument, the Court stated that a difficulty arose from the circumstance of the trustees under the settlement of the 10,000*l.* stock not being parties to the suit; because the future children of Mr. and Mrs. *Harvey* had an interest under that settlement, which would be lost, if the release were set aside, and

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(a) 2 *Bligh*, 305.(b) 1 *Swanst.* 129.(c) 5 *Swanst.* 400.(d) 1 *Ves. & Bea.* 25.(e) 1 *Atk.* 3.(g) 1 *P. Wms.* 725.(h) 2 *Atk.* 587.(i) 1 *Ves. sen.* 19.(k) *Mos.* 364.(l) 1 *Ves. sen.* 127.(m) 1 *Swanst.* 157.

the Plaintiffs were to take only under the will of *Samuel*. To remove this objection, Mr. *Sugden* undertook, on behalf of the Plaintiff, the husband, that whatever should be recovered in the suit should be settled, so far as the wife and children were interested, on the same trusts as were expressed in the deed of *December* 1819.

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This case has been treated in the argument as a family arrangement, entered into for the purpose of compromising adverse claims arising out of the doubtful construction of the will of the late *Edmund Gomond*. Upon carefully reading the pleadings and the evidence in the cause, and especially the several deeds which are component parts of the arrangement, it does not appear to me that such a view of the case is accurate. The deed of settlement of the 10,000*l.* stock made by *Ann Rowley*, to which the trustees of *Mrs. Herring*, the mother, are parties, does not represent that there was any doubtful question arising upon the will of *Edmund Gomond*, which, according to one construction, would materially affect the interests of the residuary legatees under *Samuel Gomond's* will, and that it was therefore agreed that the family of *Mrs. Herring*, as some of *Samuel Gomond's* residuary legatees, should accept the provision thereby made for them by way of compromise. On the contrary, after reciting parts of the wills of *Edmund Gomond* and *Samuel Gomond*, it states, as certain and admitted facts, that the estate of *Samuel Gomond* was indebted to the estate of *Edmund Gomond* in a sum of 42,000*l.* 15*s.*; that, in consequence thereof, the estate of *Samuel Gomond* was insufficient to pay even his pecuniary legacies; that, by reason thereof, the children of *Elizabeth Herring* would be deprived of the benefit

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intended for them by *Samuel's* will; and that, in consideration thereof, *Ann Rowley*, out of the benefits which she derived under the will of *Edmund Gomond*, makes the provision thereby given to *Mrs. Herring* and her children, who were her near relations. Upon the face of this deed of settlement, therefore, it is not a deed of compromise, but a deed of gift; although it does contain a stipulation that *Mrs. Herring* and her children are to accept the provisions thereby made for them in satisfaction of all claims under *Samuel Gomond's* will.

The language of the subsequent deed of release, which is executed by *Mrs. Herring* and her children, is to the same effect. The joint answer of *Mr. Cooke* and *Mr. Danson* is also to the same effect. This answer asserts, not that the sum of 42,000*l.* 15*s.* was a doubtful claim upon the assets of *Samuel*, but that it was a certain debt, which had been allowed to *Mr. Cooke* by his co-executors, and actually paid to him out of *Samuel's* assets on the 2d of *November* 1819; that, by reason thereof, the assets of *Samuel* were insufficient to pay his pecuniary legacies, by the sum of 2140*l.*; and that, in consequence of the disappointment occasioned thereby to *Mrs. Herring's* family, who were near relations, arrangements had been made between the several parties claiming under *Edmund's* will, which led to the settlement by *Ann Rowley*: and there is not to be found in the answer one word which imports, that *Mrs. Herring* and her children accepted the provision made by *Ann Rowley* as the terms of compromise of a doubtful right: the representation is, that they rather considered it as a voluntary and most liberal provision made for them by their relations, in respect of their disappointment under *Samuel's* will. *Mr. Cooke* in his answer further states, that, although he does not distinctly recollect it, he has no doubt that, either on the day the deed was executed,

cuted, or the day before, he fully explained the release to *Mrs. Harvey*; but he admits that no account of the trust property was rendered to her previous to her execution of the release, inasmuch "as she never required any account, being well aware that *Samuel Gomond's* estate was insufficient for the payment of his pecuniary legacies, and being perfectly satisfied with the said family arrangements." From these passages there can be no doubt what the sort of explanation was, which *Mr. Cooke* had given to *Mrs. Harvey*. He had represented to her that, *Samuel's* estate being insufficient for the payment of his pecuniary legacies, the residuary legatees could have no right to a single shilling; and, with that impression on her mind, she could not fail to be well satisfied with what is called the family arrangement.

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With respect to *Mr. Webb*, who was called in to advise *Mrs. Harvey* on the day the release was executed, all his information on the subject was derived from the perusal of the deed, which stated, as a certain fact, that *Samuel's* estate was not sufficient to pay his pecuniary legacies. No explanation was given to him of the nature of the demand arising out of *Edmund's* will, or of the state of the assets of either *Edmund* or *Samuel*; and assuming the recitals of the deed to be true, he could not fail to advise *Mrs. Harvey* to execute it.

Considering, therefore, that *Mrs. Harvey* executed this release, not as a compromise of a family question, but under an impression, produced from the language of the instrument and the explanations of *Mr. Cooke*, that there was no question of compromise, but that she was indebted to the liberality of her relations for the provision thereby made for her; and considering that this language of the deed and these explanations of *Mr.*

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Cooke were a misrepresentation of the fact; — I am of opinion that this deed cannot stand, and that *Mrs. Harvey* is as free to require the accounts of both estates, as if this deed had not been executed by her.

The alleged acts of confirmation by her subsequent receipts are of no weight; it not being suggested that she or her husband were then better informed of the facts, than she had been when she executed the deed.

The subsequent early death of *Mrs. Mary Gomond* might in some circumstances have been important, but has no weight under the actual facts of the case.

If this case could have been treated as a family compromise of doubtful rights, it would have been extremely difficult to have maintained it; not because it would have proceeded on a mistaken notion of the rights of the parties, — for this, in a family arrangement, is of no importance, — but because there was not that full disclosure of the legal opinions which *Mr. Cooke* had received, and of the state of the accounts, which the rules of a court of equity require.

Inasmuch as any children, whom *Mrs. Harvey* may have, would take a benefit in remainder under the settlement of *Ann Rowley*, it appears to me that the trustees of that settlement would have been proper parties to this suit, in order to assert the interests of such children; but as the Plaintiffs are willing to undertake that all monies, recovered by the result of this suit, shall be settled upon the same trusts for the benefit of *Mrs. Harvey* and her children as are contained in *Ann Rowley's* settlement, the absence of the trustees from the suit will create no difficulty; and, upon that undertaking by the Plaintiffs, it must now be declared, that
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the Plaintiffs are not bound by the release executed by Mrs. Harvey.

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I have already stated my opinion, that the persons, entitled in remainder under *Edmund Gomond's* will to the specific legacy of the two sums of stock and the mortgage money, and to the legacy of 2000*l.*, were not entitled to the interest or dividends thereon during the life of *Samuel Gomond*, and consequently that the estate of *Samuel Gomond* is not chargeable with such interest or dividends. If the Plaintiffs think it necessary, there must be an inquiry, whether *Edmund Gomond*, at his death, was or not possessed of Lord *De Clifford's* mortgage debt of 3000*l.*; and also an inquiry, whether *Samuel Gomond* did or not possess assets of *Edmund Gomond* sufficient to pay the legacy of 2000*l.* If the Master should find that *Edmund Gomond* was at his death possessed of Lord *De Clifford's* mortgage debt, and that *Samuel Gomond* did possess assets of *Edmund Gomond* sufficient to satisfy the legacy of 2000*l.*, then he must take an account of what is now due from the estate of *Samuel Gomond* to the estate of *Edmund Gomond* in respect of the said specific legacy, and of the said legacy of 2000*l.*: and the Master must also take the common accounts of *Samuel Gomond's* estate.

The effect of this suit on the sum of 10,000*l.* stock settled by *Ann Rowley* will be, that the share intended for Mrs. Harvey will become the property of *Ann Rowley*, and it must be so declared; and an account must be taken of the dividends which have been received by the Plaintiffs, or either of them, under the settlement; and the Plaintiff must be decreed to pay the same to *Ann Rowley*. Further directions and costs must be reserved.

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The material declarations of the decree were, "That the indenture of release, bearing date the 14th of *December* 1819, executed by the Plaintiff *Charlotte Harvey* before her marriage, so far as regards such execution by her, is fraudulent and void, and that the same, so far as affects the said *Charlotte Harvey*, ought to be set aside, and her signature erased therefrom: and that *Edmund Gomond* did by his will in the several gifts over to *Charles Cooke*, *Richard Gomond*, *Walter Gomond*, and *Elizabeth Rowley*, on failure of issue of *Mary Gomond*, intend to pass only the principal monies of 5000*l.* bank 3 per cent. annuities, of 5300*l.* bank 4 per cent. annuities, and 3000*l.* secured on mortgage, and not the dividends or interest thereon."

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Nov. 29.

SALWAY v. SALWAY.

A receiver appointed by the Court is not answerable for a loss of monies by the failure of a banker, if they are not mixed with his own monies, and are *bond fide* deposited for security only, under circumstances in which they could not have been properly paid into court.

THE object of this petition was to charge a receiver or his sureties with a loss occasioned by the failure of two country banks, with whom the receivership monies had been deposited.

The receiver, Mr. *White*, had applied to a Mr. *Adams* and a Mr. *Boulton* to be his sureties, to which they consented upon *White* agreeing that a Mr. *Anderson*, who was a partner in business with Mr. *Adams*, should attend at the rent days and have the rents paid over to him, which should thereupon be deposited with Messrs. *Prodgers*, bankers, in the names of Mr. *Adams* and Mr. *Boulton*; and that no money should be drawn out, except by drafts, the body of which should be written by Mr. *Anderson* and signed by Mr. *White*. This agreement was acted upon accordingly. In the month of *De-*
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ember 1824, Messrs. *Prodgers* became bankrupts, having the sum of 1464*l.* 2*s.* 2*d.* receivership monies in their hand; and that sum was proved under Messrs. *Prodgers'* commission by Mr. *Adams*, Mr. *Boulton*, and Mr. *White*.

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Upon the bankruptcy of Messrs. *Prodgers*, a new account was opened, upon the same principles, with Messrs. *Coleman* and *Morris*, in the names of Mr. *Adams* and Mr. *Boulton*; and, in the month of *April* 1826, Messrs. *Coleman* and *Morris* became bankrupts, having about 1300*l.* receivership monies in their hands. At the time of the proof of this sum under their commission, Mr. *Adams* was dead, and the proof was made by Mr. *Boulton* alone: and, he having a private account with Messrs. *Coleman* and *Morris*, the two sums were added together and made the subject of one proof, together with a sum added as for interest on both sums. It appeared by Mr. *White's* affidavit, that he was ignorant of the fact, that Messrs. *Coleman* and *Morris* allowed interest upon their deposits.

On the 5th of *August* 1824, Mr. *Salway*, the testator of the petitioners, obtained an order from the then Master of the Rolls, that Mr. *White* the receiver should pay to him, Mr. *Salway*, a sum of 617*l.* 17*s.* 7*d.*, being the balance in his hands upon the last account passed by him, after deducting out of it the costs of the application; and that Mr. *White* should also pay to Mr. *Salway* all future balances upon his subsequent accounts, as they should be reported due from him, in respect of his receipts up to Midsummer 1824. After this order of the 6th of *August* 1824, and in ignorance of it, Mr. *White* remitted the sum of 617*l.* 17*s.* 7*d.*, being the balance of the last account which he had passed, to his solicitor in *London*,
with

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with instructions to pay it to the Accountant-General, pursuant to the order by which he had been appointed receiver; but, upon application to the Accountant-General's office, the order in favour of Mr. *Salway* being known, it was not received by the Accountant-General. The *London* solicitor kept the money in his hands for some months, and then returned it to Mr. *White*. Mr. *Salway* died in *February* 1825; and it did not appear that he had ever made any application to Mr. *White* or his *London* solicitor for this sum. Mr. *Salway's* will was not proved till the year 1827. In the mean time, the receivership monies were dealt with as above stated; and no account, subsequent to that upon which the balance of 617*l.* 17*s.* 7*d.* was found to be due from the receiver, was passed, until after the probate of Mr. *Salway's* will. Finally, upon such subsequent account, a balance of 2843*l.* 10*s.* 3½*d.*, including the 617*l.* 17*s.* 7*d.*, was found to be due from him to Mr. *Salway*, under the order of the 6th of *August* 1824.

Under this state of circumstances, it was contended on the part of Mr. *Salway's* executors, that the receiver or his sureties must pay the full sum of 2843*l.* 10*s.* 3½*d.*: first, because the receiver had dealt improperly with the money, and had put it under the control of other persons; secondly, because, when he found there was no personal representative of Mr. *Salway*, he ought to have paid the money into Court; and, thirdly, because interest had been made of the money.

Mr. *Sugden* and Mr. *Wakefield*, for the petition.

Mr. *Rose*, for the receiver.

Mr. *Bickersteth*, for the sureties.

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The following cases were cited: *Knight v. Plymouth* (a), *Beauchamp v. Silverlock* (b), *Horsley v. Chaloner* (c), *Ex parte Belchier* (d), *Rider v. Bickerston* (e), *Routh v. Howell* (g), *Wren v. Kirton*. (h)

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If Mr. *White* had so dealt with this money as to place it under the control of other persons, in a manner which would have exposed it to loss or prejudice by the conduct of such other persons, there would have been much weight in the argument which has been used against him. But in truth the money never was under the control of Mr. *Adams* and Mr. *Boulton*, or exposed to loss or prejudice by being placed in their names. The bankers being specially directed to pay only by drafts signed by the receiver, it could not be applied by Messrs. *Adams* and *Boulton* to any foreign purposes; nor could it have been deemed their property, if they had become bankrupts. The precautions used were meant to secure the due application of the monies by Mr. *White* to receivership purposes only; and so far were beneficial, and not injurious, to the trust estate.

As to the alleged duty of Mr. *White* to pay the monies to the Accountant-General, when it was found that there was no personal representative of Mr. *Salway*, — it is to be observed, that they could not be so paid. The Accountant-General could not have received these sums without a special order.

With respect to the interest proved under the commission of Messrs. *Coleman* and *Morris*, the receiver

(a) 5 Atk. 480. cit. 3 Ves. 566.

(b) 2 Chan. Rep. 9.

(c) 2 Ves. sen. 84.

(d) Amb. 218.

(e) 5 Bac. Ab. 401.

(g) 3 Ves. 565.

(h) 11 Ves. 377.

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states in his affidavit, that he was not aware that interest was made: and it could not, therefore, have been with a view to the profit of interest, that the deposit was made with Messrs. *Coleman* and *Morris*.

Upon the whole, I am of opinion, that the receiver and his sureties are not responsible for the loss sustained by the failure of the two bankers. The receiver must account with the executors of *Mr. Salway* for all dividends paid on the proof, and, if required, must assign to them all future dividends.

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Nov. 29.

THOMAS v. BRIGSTOCKE.

A mortgagee has no title to the rents of the mortgaged premises, which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor; notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him.

He ought to have followed up that notice by moving to discharge the receiver.

THIS was the petition of a mortgagee, to be paid the rents of the mortgaged premises, which had accrued due since the 18th of *June* 1818, and had been paid into Court by a receiver, who was appointed on the 22d of *May* 1818, in a suit to which the mortgagee was not a party, and which was instituted for the purpose of carrying into execution the trusts of the mortgagor's will.

After the appointment of the receiver, the mortgagee, whose title was at that time disputed, had given notice to the tenants of the mortgaged estate to pay their rents to him; but, in consequence of the appointment of a receiver, the notice had been disregarded.

In *March* 1827, a petition was presented by the mortgagee, praying that the receiver might be discharged; and, on the 6th of *August* 1827, an order, discharging the receiver, was made.

The

The rents in Court had accrued due between the time of the receiver's appointment and the time of his discharge.

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Mr. Sugden and Mr. Ching, for the petition.

Mr. Bickersteth and Mr. Jacob, *contra*.

For the petitioner, the mortgagee, it was argued, that he had entitled himself at law to the rents by his notice to the tenants in *June* 1818, and that equity would not permit the appointment of a receiver to deprive the mortgagee of his legal rights.

Bertie v. Abingdon (a), and *Gresley v. Adderley (b)*, were cited.

The MASTER of the ROLLS.

A mortgagee is entitled only to such rents as accrue due when he is in possession of the mortgaged premises. His notice to the tenants could not divest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor. For the purpose of divesting the possession of the receiver, an application to the Court was necessary; and it seems that the mortgagee actually made such application a few months since, and obtained an order for the discharge of the receiver. From the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge, he may be considered in possession: but he can have no intermediate rents, when he was out of possession.

The

(a) 5 *Mer.* 560.

(b) 1 *Swanst.* 573.

1827.

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The mortgagee appealed from this decision.

Mr. Sugden and Mr. Ching, in support of the appeal.

The notice given to the tenants in 1818 completed the legal title of the mortgagee to receive the rents; if the Court had not interposed, the tenants could have made no payments, except to him; and, as against the mortgagee, the appointment of a receiver was a wrongful act. The Court, if its attention had been called to the claim of the mortgagee, would have refused to make any order to the prejudice of his rights: and in discharging the receiver on his application, it has in fact declared, that, as against him, no receiver ought to have been appointed. If the monies, which came into the hands of the receiver, had been paid away, they could not have been brought back; but they remain in Court; they have not been received by the mortgagors, and the only question is, for whose benefit are they to be considered as secured? The mortgagee had a perfect legal title to the rents from the moment of his notice to the tenants; and there is no equity which can be set up against him. The possession of the receiver cannot be of more avail against the mortgagee than the possession of a sequestrator would have been: and, in *Hamblyn v. Ley* (a), sequestrators, who had obtained possession, were ordered to account for the rents and profits to the persons who had obtained a prior conveyance.

Mr. Bickersteth and Mr. Jacob, *contra*.

The LORD CHANCELLOR dismissed the petition of appeal with costs.

(a) 3 Swanst. 301. note.

1827.

HOWELL v. EDMUNDS.

Rolls.
Nov. 30.
Dec. 6.

THIS was a petition to discharge an order obtained, as of course, by a client for the taxation of his solicitor's bill, after the only bill delivered had been settled and paid. The bill had been delivered about or before the middle of 1826; the payment took place in *November* 1826; and the order of taxation bore date on the 3d of *July* 1827.

The payment of a solicitor's bill pending a suit, does not preclude subsequent taxation.

It appeared upon the affidavit of the client, that, at the time of the bill delivered, the suit, in which it had been incurred, was then, and still continued to be, pending; and that the money, with which the demand for costs was satisfied, had been borrowed by the client on mortgage, in consequence of the solicitor's threatening to arrest him, unless the bill were paid.

Mr. Knight, for the petition.

After a bill of costs has been paid, it is irregular to obtain an order of course for taxation; the client, if he desire to have the bills taxed, must make a special application, and must support his application by shewing, that they contain improper and exorbitant charges. Here the petition, on which the order was obtained, contains the common recital, that many of the charges are extravagant and unreasonable; but, not even in the affidavit which has been filed, in opposition to the present application, are specific items pointed out and impeached as extravagant.

1827.

HOWELL
v.
EDMUNDS.

Mr. J. Russell, *contra*.

It is not the mere payment of a bill of costs, but it is payment with long acquiescence, that precludes taxation, where items of gross overcharge are not specified. "If a bill of costs," says Lord *Eldon* in *Langstaffe v. Taylor* (a), "has been settled and paid, and the payment has been acquiesced in, the Court will not refer the bill to be taxed as a matter of course." If the payment, having been made recently, has been accompanied with a protest, or has been made under pressure, or during the continuance of the relation of solicitor and client, the client is entitled to have the bills taxed, without impeaching specific items as exorbitant: and though it may be the more regular course to obtain, under such circumstances, an order of taxation on special application, it is not the habit of the Court to discharge an order of taxation obtained as of course, when it is satisfied, that, upon a special application, an order for taxation would certainly be made, *Bennett v. Hart* (b), *Crossley v. Parker* (c), *Hazard v. Lane* (d), *Gower v. Popkin* (e), *Harrison, Chan. Pract.* 397. *Ed.* 1808.

Dec. 6.

The MASTER of the ROLLS.

The bill in question must certainly be taxed, not only because the suit, in which it was incurred, was pending when the bill was paid, from which circumstance influence and pressure upon the client will be assumed; but because there was, in fact, actual pressure by the threat of an arrest. Considering it, however, not regular to obtain, after payment, an order for taxation as of course, though I shall dismiss this petition, it shall be without costs.

(a) 14 *Vesey*, 262.(b) *Sayer*, 325.(c) 1 *Jac. & W.* 460.(d) 3 *Mer.* 385.(e) 2 *Stark.* 85.

1827.

READ v. STEWART.

ROLLS.
Dec. 1.

THE will of *Mary Bullock*, dated the 29th of October 1823, contained the following bequest: "I give to *Sarah Clewer* the sum of 100*l.* money, to be paid twelve months after my decease. My cabinet with whatever it contains, except money, I give to *Sarah Clewer* in addition to the legacy of 100*l.*"

A bequest of a cabinet, with whatever it contains "except money," will not pass a promissory note payable to the testatrix of a date anterior to the will, and which, at her death, was found in the cabinet.

In the cabinet mentioned in the bequest, there was, at the death of the testatrix, besides various other things, a promissory note in the following form :

"*London, April 24th, 1822. £100.* Five years after date I promise to pay to Mrs. *Mary Bullock* the sum of one hundred pounds, which I owe to her for money lent to me.
E. Broom."

The bill was filed by *Sarah Clewer* and her husband for the purpose of enforcing their claim to the promissory note against the executor and residuary legatees; and the only question in the cause was, whether the note passed by the bequest.

It did not appear, whether the note was in the cabinet at the date of the will.

Mr. *J. Russell*, for the Plaintiffs.

Mr. *Girdlestone*, *contra*.

The cases of *Jones v. Selby* (a), and *Southcot v. Watson* (b), were cited.

The

(a) *Prec. in Chan.* 289—301.

(b) 3 *Alk.* 227.

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The MASTER of the ROLLS was of opinion, that the testatrix did not intend that the promissory note should pass by the bequest of "the cabinet with whatever it contained except money:" and he dismissed the bill without costs.

ROLLS.
 Dec. 5.

BUTTER v. OMMANEY.

A bequest to all the children of *A.* and their issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of *A.* as are living at the testator's death.

BERNARD BUTTER, by his will, dated on the 7th of August 1818, bequeathed to the children of his brother *Joseph Butter* and their lawful issue, in case any of them should die leaving lawful issue, the sum of 2000*l.* to be equally divided among them, and payable one year after their father's, and his, the testator's, decease, but without interest in the mean time. Then, after a similar bequest of 2000*l.* to the children of his late sister *Betty Pratt* and their lawful issue, in case any of them should die leaving lawful issue, he gave "unto and amongst all and every the child and children of his late brother, *Jacob Butter*, deceased, and their issue, (except his nephew *Bernard Butter*), the sum of 2000*l.*, to be equally divided amongst them, share and share alike," to be paid within twelve months next after his, the testator's, decease. As to the residue of his estate, real and personal, after providing for certain payments and creating a trust for accumulation, he gave it, after the death of his wife and his brother *Joseph*, to be equally divided between the children of his said brother *Joseph Butter*, and his late sister *Betty Pratt*, and late brother *Jacob Butter*, (except *Bernard Butter*), who should be then living, in equal shares and proportions; and as to such of them as should be then dead, leaving a child or children,

children, such child or children were to be and stand in the place or places of his, her, or their parent or parents.

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OMMANET.

The suit was instituted by *Jacob Butter*, *Benjamin Butter*, and *James Butter*, who were the only children of the testator's brother, *Jacob Butter*, living at the death of the testator, or at the date of his will. They had children living. There had been other children of *Jacob* the brother, who had died leaving children.

The question was, Whether the Plaintiffs took the 2000*l.* absolutely; or whether their issue and the issue of deceased children of *Jacob Butter*, or any of such issue, had any interest in the bequest.

Mr. Horne and *Mr. Wray*, for the Plaintiffs, argued that the bequest to the children of *Jacob Butter* and their issue, gave the children of *Jacob Butter*, who were living at his death, a *quasi* estate tail, *Lampley v. Blower* (a); and, therefore, that the Plaintiffs were entitled to the legacy absolutely.

Mr. Sugden and *Mr. J. Russell*, for the children of a daughter of *Jacob Butter*, who died in the testator's lifetime, *contra*.

It is apparent from the bequests to the families of *Joseph Butter* and *Betty Pratt*, and also from the residuary clause, that the issue of deceased nephews and nieces were among the objects of the testator's bounty, and that he meant them to participate with their uncles and aunts; and the clause relating to the children of *Jacob Butter*, though the language of it is not so full as the

(a) 3 *Atk.* 396.

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the expressions in the bequests to *Joseph* and *Betty* and in the residuary disposition, may be fairly construed as a gift to the children of *Jacob* living at the testator's death, and to the issue of such of them as should be then dead.

If this construction be not adopted, the words, "and their issue," are words not of limitation, but of purchase: and, under the gift to children of *Jacob* and their issue, all persons will take, who answer the description either of children of *Jacob* or of issue of children of *Jacob*. *Co. Litt.* 9 a. *Wilde's case* (a), *Cook v. Cook*. (b) In *Alcock v. Ellen* (c), a term was devised to a woman and her children, she having then three children; and it was held, that she and the three children took jointly. In *Oates v. Jackson* (d), the devise was to a woman and her children of her body begotten by her then husband, and their heirs; and it was held, that she and her children took as joint tenants in fee. In *Buffar v. Bradford* (e), a portion of the residue was given to the testator's niece and the children born of her body; the niece had no child at the date of the will, but died afterwards in the testator's lifetime, leaving a child: Lord *Hardwicke* decided, that, had they both lived, she and the child would have taken as joint tenants; and that, she being dead, the child took the whole.

Mr. *Capron*, in support of the same construction, cited *Hamilton v. Royle*. (g)

The MASTER of the ROLLS held, that the legacy of 2000*l.* vested absolutely in the three children of *Jacob Butter*,

(a) 6 Rep. 17.
 (b) 2 Vern. 545.
 (c) Freem. 185.

(d) 2 Strange, 1172.
 (e) 2 Atk. 220.
 (g) 4 Ves. 457.

Butter, the brother of the testator, who were living at the testator's death, to the exclusion both of the issue of those three children, and of the issue of such children of *Jacob* the brother as died in the testator's lifetime.

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BUTTER
v.
OMMANEY.

The cause was heard on further directions before the Vice-Chancellor: and the question then was, whether, under the residuary clause, the children of such children of the testator's brothers and sister as died in his lifetime*, were entitled to a share of the residue.

On behalf of the claim of the children of such deceased children, it was argued that the plan of the testator was to substitute the issue of deceased nephews and nieces as objects of his bounty in the place of their parents; and that whatever the parent would have taken, had he or she been alive at the time of the distribution of the fund, was to go to their children. It was of no importance whether a nephew or niece died in the lifetime of the testator or after his death: in neither case could he or she take, if they died before the period fixed for the division of the fund; but if they left children, those children were to take in their stead. The direction, that "such children were to stand in the place of their parent," did not mean that they were to take what had become vested in the parent; for no share of the residue vested in the nephews and nieces, till the time of distribution arrived; and the limitation in favour of the children of nephews and nieces had reference to the children of such nephews and nieces only as had died previously. The clause, therefore, was an express direc-

1828.
August.
A testator bequeathed the residue of his estate, after the death of two persons, to such children of *B.* as should be then living; and as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents: Held, that the children of such children of *B.* as died in the testator's lifetime took no share of the residue.

* The children, who died in his lifetime, were all dead at the date of the will.

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tion, that, if, when the period of distribution came, any of his nephews and nieces were dead, leaving children, those children were to take what the parent, if alive, would have taken : and to exclude children of nephews and nieces who died before the testator, was to impose on the bequest a restriction not prescribed or justified by the words of the will.

The VICE-CHANCELLOR held, that the children of such children of *Joseph Butter*, *Betty Pratt*, and *Jacob Butter*, as died in the testator's lifetime, were not entitled to any share of the residue. *

“ Declare that the clear residue of the testator's estate and effects vested in such of the children only of the testator's brothers and sisters, *Jacob Butter*, *Joseph Butter*, and *Betty Pratt*, as were living at his decease, in equal shares, subject, as to each of such shares, to be divested in favour of their children, as joint tenants of the parent's share, in case of the parent's death before the period of division.”

* *Christopherson v. Naylor*, 1 Mer. 320.

1827.

AMPHLETT v. PARKE.

ROLLS.
Dec. 5.

IN this case a testatrix, having devised her real and personal estate to trustees upon trusts for sale, directed that the proceeds of her real estate should be taken as part of her personal estate; and that, out of the monies to arise by such sale, and out of all other her personal estate, several legacies should be paid; and she then gave the residue to *Elizabeth Parke* for life, with remainder over.

The personal estate was not sufficient to pay the legacies; and some of the legatees died in the testatrix's lifetime. One question was, whether the real estate was absolutely converted into personalty, so that the lapsed legacies fell into the residue, or whether the conversion was partial only, and therefore those legacies belonged to the heir?

The pecuniary legacies were not paid, until the end of a year after the testatrix's death; and, the funds out of which those legacies were paid, produced rents or dividends in the mean time. A second question was, whether this income belonged to the tenant for life, or was to be considered as capital of which she would take only the interest?

The case had been argued before Sir *John Leach*, as Vice-Chancellor, who held that the real estate was absolutely converted into personalty; that the lapsed legacies belonged to the residuary legatee, and not to the heir; and that the year's income of the fund, with which the legacies had been paid, formed part of the capital

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 v.
 PARKE.

capital of the residue, and did not belong to the tenant for life. The facts of the case, and His Honor's judgment, are reported in 1 *Sim.* 275.

The parties had differed in drawing up the minutes of the decree, and the case was again brought on to be heard before Sir *John Leach* at the Rolls.

Mr. *Sugden* and Mr. *Andrews*, for the heir, in addition to the cases referred to in the former argument, cited *Collins v. Wakeman.* (a)

The MASTER of the ROLLS came to the same conclusion on both questions, as at the former hearing.

(a) 2 *Ves.* jun. 685.

ROLLS.
 Dec. 6.

WALKER v. MACKIE.

A will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power.

The subject of the power will pass by the words of "all other my property," if it be plain, from other expressions in the will, that, under these general words

THE testatrix in this case had power to appoint by will a certain leasehold estate, and certain sums of 3 per cent. stock, which were standing in the name of the Accountant-General of the Court of Chancery. She was entitled to both for her life; and the stock had been transferred to the Accountant-General upon a bill filed by her.

The testatrix began her will by giving certain pecuniary legacies, and then gave "all the rest and residue of her bank stock to her god-daughter *Mary Ann Wood*, with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed at

she considered the property under the power to be included.

at the time of her decease, excepting 50*l.* of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court, over which she had a power of appointment.

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WALKER
v.
MACKIE.

The question was, whether the will was a good execution of the power, so as to pass the stock.

Mr. *Sugden* and Mr. *Phillimore*, for the Plaintiff.

Mr. *Beames*, for the Defendant.

The MASTER of the ROLLS was of opinion that the will was a good execution of the testatrix's power as to the 3 per cent. stock in court; that her pecuniary legacies were payable out of it; and that the will was also a good execution of her power as to the leasehold estate; it being plain that she meant to describe the property, over which her power extended, under the words — "all other property which she possessed," — by excepting out of it 50*l.* of her bank stock, which she gave to her executors.

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Dec. 6. 10.

EDWARDS v. ALLISTON.

Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross remainders as to the original shares.

BY indentures of lease and release bearing date on the 26th and 27th of *August* 1782, being the settlement made on the marriage of *James Crompton* and *Sarah Corney*, *Thomas Sandford*, the uncle of *Sarah Corney*, conveyed certain lands and tenements to the use of *Sarah*, the wife of him *Thomas Sandford*, and her assigns, for her life; remainder to the use of *James Crompton* and his assigns, during his natural life; "remainder to the use of *Berkhead Hitchcock* and *Robert Dean*, and their assigns, during the life of *James Crompton*, upon trust to support contingent remainders; remainder to the use of *Sarah Crompton*, and her assigns, during her life; remainder to the use of all and every the child and children of the body of *James Crompton* on the body of *Sarah* his wife, lawfully begotten or to be begotten, equally to be divided between or among them; if more than one, share and share alike as tenants in common, and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and if there should be a failure of issue of the body or bodies of any such child or children, then as to the part or share, or parts or shares, of such child or children, when issue should so fail, to the use of the remaining and other children of the body of *James Crompton*, on the body of *Sarah* his wife lawfully begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, and they to take as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the body

body and bodies of such remaining and other children lawfully issuing; and, in case there should be a failure of issue of the bodies of all such children but one, or, if there should be but one such child, then to the use of such only remaining or only child, and the heirs of his or her body lawfully issuing:" and for default of such issue, to the use of the right heirs of *Thomas Sandford* for ever.

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There were seven children of the marriage, four of whom died without issue: viz. *James Dickenson*, who died in 1823; *Thomas*, who died in 1785; *Joshua*, who died in 1800; and *Margaret*, who died in 1811. In 1825, *Mary*, *Sarah*, and *Louisa*, the three surviving children and their husbands suffered a common recovery, which, it was declared, should enure to the use of *Edwards* and *Barlow*, and their heirs upon certain trusts.

Edwards and *Barlow*, having agreed with the Defendants for a sale of the premises, filed a bill to enforce the performance of the contract. The usual reference was directed; and the Defendant carried in various objections to the title. Of these the principal was the following: — That, in consequence of the want of words in the indenture of the 27th of August 1782, to create cross remainders as to the surviving shares taken by the children who afterwards died without issue, the vendors had not shewn a title to the three-sixths of the one-seventh share alleged to have belonged to *Thomas Crompton*, which, on his death without issue, survived to his brothers *James* and *Joshua*, and his sister *Margaret*; nor to the two fifths of the one seventh share alleged to have belonged to *Joshua*, which, on his death without issue, survived to *James* and *Margaret*; nor to the one fourth of the one seventh share alleged to have belonged to

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to *Margaret*, which, on her death without issue, survived to *James*.

The Master reported that a good title was shewn; and the Defendants excepted to the report.

Mr. *Tyrrell*, in support of the exception, cited the note by *Williams* in 1 *Saunders' Reports*, 186, *Nevell v. Nevell* (a), *Couden v. Clerk* (b), *King v. Melling* (c), *Doe v. Wainwright* (d), *Doe v. Dorvell* (e), *Doe v. Worsley* (g), *Meyrick v. Whishaw* (h), *Levin v. Weatherall* (i). These authorities, he argued, established the rule, that, in a deed, cross remainders cannot be raised by implication, however evident it may be that the probable intention of the parties was, that there should be cross remainders. Here the property was limited to the children in tail as tenants in common; and there was a direction, that the part or parts of a child or children, whose issue should fail, should go to the remaining children. But if any of these remaining children should die without issue, though their original shares were by the words limited over, there were no words which would carry the share or shares which might have accrued to them.

Mr. *Sugden* and Mr. *Seton*, for the Plaintiffs.

The words, which are used here, are as sufficient to create cross remainders, as the words in *Doe v. Wainwright*. The question is one, not of implication, but of construction. We do not say that cross remainders are to be implied; but we contend that no precise form of words

(a) 1 *Roll. Ab.* 857.

(b) *Hob.* 34.

(c) 1 *Ventr.* 325.

(d) 5 *T. R.* 427.

(e) 5 *T. R.* 518.

(g) 1 *East*, 416.

(h) 2 *B. & A.* 810.

(i) 1 *Brod. & B.* 401.

words is necessary in order to create cross-remainders, and that the words, which are used here, if fairly construed, so as to give them full effect, are sufficient to carry the original, as well as the accrued, shares to the surviving children. There is an express limitation, that, if there should be a failure of issue of the body or bodies of any of the children, the part or parts, share or shares, of such child or children, shall go to the remaining children, and the heirs of their bodies respectively, as tenants in common. Cross remainders, therefore, are created — created beyond all doubt as to the original shares; and the only question is, what interpretation shall be put on the words, “part or parts, share or shares.” Do they denote all the share of interest which each child has, when he or she shall die without issue? Or do they denote only that share of interest which the child took originally? The former construction is the more natural, even if we do not extend our view beyond this clause of the deed. At all events, the words must be admitted to be ambiguous; if they may mean only original shares, they may also mean both original and accrued shares. But the settlor has, in the subsequent part of the deed, explained the meaning of terms, which, in themselves, might be deemed of doubtful signification. For there is a limitation, that, in case there shall be a failure of issue of the bodies of all the children but one, the whole of the property is to go to that one child. Suppose that there had been only three children of the marriage, and that one of them had died without issue, the share of the one so dying would have accrued to the other two; suppose one of these two to have died without issue, the whole estate, by force of the deed, would have been vested in the survivor; so that, in such a state of circumstances, it is clear that the words “part or parts, share or shares” must mean accrued, as well as original, shares. Such being the construction, which

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must

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must have been put upon the words, if there had been only three children, it would be absurd to construe them differently, because there have been seven children. Four of these seven children have died without issue: but if, instead of four, six had so died, the words, to which we have alluded, would have carried the whole estate, that is, all the shares both original and accrued, to the sole surviving child. How could this effect have been wrought, if, at the death of each child, his or her original share alone, and not the accrued shares, had gone over from time to time to the survivors?

If there should be a failure of issue of all the children, the whole estate is limited over to the heirs of the settlor. This purpose could not be effected, unless, upon the death of any of the children without issue, all the share, whether original or accrued, which had belonged to a child so dying, went over to the survivors.

The clauses, which provide for the events of all the children, or of all the children except one, dying without issue, distinguish this case from all those in which it has been held that cross remainders were not created.

Dec. 10. *The MASTER of the ROLLS.*

In this case, the impression, which was made upon my mind, in favour of the title, has been removed by an attentive consideration of all the authorities.

The bill is filed for the specific performance of a contract for the sale of an estate. Upon a reference to the Master, he reported in favour of the title; and to this report the purchaser took an exception.

The

The objection to the title was, that, although cross-remainders were limited as to the original shares of each child, yet they were not limited as to the shares which accrued to the remaining children by the subsequent deaths of others; and, consequently, that the three remaining children could not make a good title to the parts or shares, which, upon the successive deaths of the three children, who had died last, had respectively accrued to those children. For the vendor it was argued, that the limitation of the whole estate to the only remaining child, and the heirs of his body, in case there should be only one remaining child, and the limitation over of the whole estate in default of all issue, added to the express limitation of cross-remainders with respect to the original shares, not only left no doubt of the settlor's intention to create cross-remainders as to the accruing shares, but amounted, even in a deed, to a sufficient declaration of his purpose to give effect to his intention.

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Of the intention of this settlor to create cross-remainders, as to the accruing shares, there can be no reasonable doubt. The question is, Whether he has so expressed that intention, as to give effect to it in a deed? The direction that the estate should go wholly to an only surviving child, and should wholly go over in remainder, if there was a failure of issue of all children, plainly denotes the settlor's intention; because these ultimate purposes could not be effected without cross-remainders as to the accruing as well as the original shares: and it must be inferred, that he who intends a particular purpose, must intend the means by which that purpose is to be accomplished. But the authorities say, that this is mere implication, and that, although it would give effect to a will, it cannot operate in a deed: and such is the result of several cases which have been cited in this argument. It did not, however, occur in

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the decided cases, that the settlor had expressly created cross-remainders as to the original shares of the children: and it is contended that this circumstance, added to the direct limitation of the entire estate to the only surviving child, and the gift over of the entire estate in remainder upon the failure of all the children and their issue, not only clearly manifest the settlor's intention, but amount altogether to a sufficient expression of that intention in a deed.

It must be admitted, that, under these several circumstances, no doubt can be entertained of the settlor's intention: but still the difficulty remains, whether you can arrive at this conclusion without that sort of implication, which in such cases is excluded from the construction of a deed. If the inference that the settlor must have intended that cross-remainders, as to the accruing shares, should be created, because he has intended a purpose which could be effected only by such means, is to be considered as an implication which is to be rejected in the construction of a deed — must not the inference, that the settlor intended that cross-remainders should be created as to the accruing shares, because he has expressed such an intention as to the original shares, be considered also as an implication, which is to be equally rejected in a deed? Can this additional circumstance do more than afford additional implication of the same intention? And if the Court cannot act at all in this matter by implication, can it be of importance, whether there is one circumstance only or ten circumstances, which afford the same implication? The case of *Doe v. Wainwright* (a) has been referred to in this argument. In that case, as in this, there was a limitation

(a) 5 T. Rep. 427.

limitation of the entire estate to an only child, and the remainder over of the entire estate was limited upon the failure of all issue; and in that case, as in this, there was also an express creation of cross-remainders as to the original shares. But in that case there immediately followed these words:—"And so, *toties quoties*, as any of the said children should die without issue, till there should be only one child left." These latter words, which, unfortunately, are not found in this case, were very properly considered as expressly extending the cross-remainders to the accruing shares; and that case, therefore, is no authority for this.

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Upon an accurate view of all the cases, I am compelled to declare, that, although there is no doubt here of the settlor's intention, yet, there is no authority to be found in the books, which would justify me in stating, that the settlor has used here such expressions, with respect to the accruing shares, as are in a deed necessary to raise cross-remainders with respect to the accruing shares; and, least of all, can I come to that conclusion as against a purchaser.

The exception to the Master's report of a good title must be allowed.

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Dec. 6.

FARMER v. MILLS.

A testator, by his will, gave certain annuities, and directed that the sums, set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate: By a codicil to his will, he stated, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: Upon the death of any annuitant, the sum, set apart to secure the reduced annuity, will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will.

THE testator in this case by his will gave certain annuities, which were to be secured by the investment of sufficient sums either in the funds or on mortgage: he directed, that, as the annuitants should die, the sums, by which the annuities were secured, should sink into and become a part of the residue of his estate: and he named several persons as his residuary legatees. By a codicil to his will he stated, that, upon reflection, he considered it to be probable, that, after full payment of his funeral expenses, debts, and legacies, there might not be property left, which would be adequate to produce interest sufficient to pay the annuities given by his will; and in such case he directed that an equal deduction should be made from each annuity rateably according to its amount, after the expiration of six months from his death: in which time he considered that his affairs might be closed, so as to ascertain the amount of his property.

His estate did prove insufficient for the full payment of the several annuities given by his will: and the question in the cause was, Whether, upon the death of any annuitant, the sum set apart to secure his reduced annuity should be applied to increase the other annuities, until they were made to amount to the sums given by the will? or, whether the sum so set apart should belong to the residuary legatees?

The MASTER of the ROLLS.

If the case had rested upon the will, the residuary legatees could have taken no benefit, until the annuities were

were fully provided for. By the codicil the testator, in case of the deficiency of his property to supply by its interest the whole amount of the annuities given by his will, directs that those annuities shall be rateably reduced, so as, upon the whole, not to exceed the income of his property. The annuitant, who receives his reduced annuity, receives all that the testator intended he should receive, in case of the deficiency of his property: and the sum set apart to secure the reduced annuity will sink into the residue, in the same manner as it would have done, if the property had been adequate to provide for the sum given by the will.

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BRADDON v. FARRAND.

ROLLS.
Dec. 7.

THE testatrix in this case was a person of inferior station in life, and had formerly lived as a servant in the family of Mr. *Farrand*, a merchant in the city of *London*. She began her will in the following words: "I constitute and appoint *Robert Farrand of Fenchurch Street, Esq.*, my executor, to see that my will is put in force." She then gave pecuniary legacies to various persons: but the instrument contained no express disposition of the residue.

A testatrix appointed *A. B.* to be her executor, to see that her will was put in force: the executor is a trustee for the next of kin.

No legacy was given to Mr. *Farrand*; and the question in the cause was, whether Mr. *Farrand* was beneficially entitled to the residue?

Mr. *Sugden*, for the Plaintiff, who claimed as next of kin to the testatrix, cited *Seley v. Wood (a)*, *White v. Evans (b)*, *Giraud v. Hanbury. (c)*

Mr.

(a) 10 *Ves.* 75.

(b) 4 *Ves.* 21.

(c) 3 *Mer.* 150.

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FARRAND.Mr. *Horne* and Mr. *Matthews*, *contrâ*.

The will merely appoints an executor; the words, "to see that my will is put in force," express nothing which is not necessarily implied in the appointment of an executor: the character of executor gives the person, who is clothed with it, a right to the residue not disposed of, unless there is a plain indication that he is not to take a beneficial interest: and here no such indication can be pointed out.

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The question is, Whether this testatrix can be considered as having expressed an intention to confer an office only upon Mr. *Farrand*, and not a beneficial interest? She states the purpose of her appointment was, that Mr. *Farrand* should see that her will was put in force; and her purpose, therefore, was, to confer an office and not a beneficial interest.

Declare that Mr. *Farrand* is a trustee of the residuary estate for the benefit of the testatrix's next of kin.

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HARRIES v. BRYANT.

ROLLS.
Dec. 10.

THE Plaintiff had taken an assignment of a lease for three lives, which contained a covenant for renewal from time to time, on the falling of each life, upon payment of a small fine, provided application were made for renewal within six months after the life dropped. *Alcock*, one of the *cestuisque vie* named in the lease, died on the 31st of *January* 1822; no application was made for a renewal, until the 12th of *November* 1822; and, renewal being then refused, this bill was filed.

Alcock had removed from the place where he resided at the granting of the lease; but died in the immediate neighbourhood of the Plaintiff; having been for some years the overseer of a parish adjoining to that in which the Plaintiff resided. The Plaintiff alleged, that he neither knew that the deceased person was the life named in the lease, nor that he was dead, until after the expiration of the six months.

Mr. Sugden and *Mr. Cooper*, for the Plaintiff.

The principle of a court of equity is compensation, not forfeiture: and here the compensation can be easily ascertained; for the only injury, which the landlord has suffered, is the non-payment of a pecuniary fine. In *Eaton v. Lyon (a)*, Lord *Alvanley* says, "If by unavoidable accident, if by fraud, by surprise, or ignorance not wilful, parties may have been prevented from executing a covenant literally, a court of equity will interfere; and,

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the *cestuisque vie*, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased person was one of the *cestuisque vie* named in the lease: The bill was dismissed with costs; because the Plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence.

upon

(a) 5 Ves. 692.

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upon compensation being made, the party having done every thing in his power, and being prevented by the means I have alluded to, will give relief." In *Bateman v. Murray* (a), in the House of Lords, Lord *Thurlow* said, "Courts of equity will relieve the lessee, if he has lost his right by fraud of the lessor, or accident on his own part; but will never assist him where he has lost his right by his own gross laches or neglect:" and again: "Where the lessee has lost his legal right, he must prove some fraud on the part of the lessor by which he was debarred the exercise of his right, or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying for a renewal at the stated times, according to the terms of his lease." In the present case, *Alcock* was by trade a shoemaker; and it was not to be expected that the death of an obscure individual should be immediately known, beyond the circle of his immediate acquaintance. It cannot be imputed to the Plaintiff as gross laches or neglect, that he was not informed of *Alcock's* death, till more than six months had elapsed; but, as soon as he was apprised of the fact, he applied for a renewal. His ignorance could not be called wilful; and it was merely from ignorance or misfortune, that the lease was not renewed within the prescribed time. *Rawstorne v. Bentley* (b), *Sanders v. Pope*. (c) The equity, on which this bill is founded, was at one time carried to an extreme length in *Ireland*; and when it was brought within reasonable limits by the decision of the House of Lords in *Kane v. Hamilton* (d) and *Bateman v. Murray* (e), the *Irish* tenantry act, 19 & 20 G. 3. c. 30., was passed, which at once recognised and defined the principle

(a) Cited in 4 Bro. 417.

(b) 4 Bro. C. C. 415.

(c) 12 Ves. 290—295.

(d) 1 Ridgway, 180.

(e) 1 Ridgway, 187.

ciple on which equity should in such cases interfere. The decisions on that act are authorities, by analogy, for this Plaintiff's claim to relief. *Jackson v. Saunders* (a), *Lennon v. Napper*. (b)

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A court of equity will relieve against the effect of an express covenant, where strict performance of the condition is prevented by ignorance not wilful, or by unavoidable accident. Ignorance is considered to be wilful, where a person neglects the means of information, which ordinary prudence would suggest; and accident is not unavoidable, which reasonable diligence might have prevented.

When the Plaintiff became the assignee of a lease containing such a conditional covenant for renewal, ordinary prudence would have suggested, and reasonable diligence would have required, that he should have ascertained who the lives were, and have taken measures to secure early information of their deaths. All this he appears to have neglected; his ignorance, therefore, was wilful, and the accident not unavoidable, assuming the facts to be as he alleges them. Let the bill be dismissed, and with costs.

(a) 1 Sch. & Lef. 443.; 2 Dow, 437.

(b) 2 Sch. & Lef. 682.

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Dec. 12, 18.

LAW v. THOMPSON.

The intention of a testator, that his gift should not vest in the legatee, until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident.

THE testator, *Clotworthy Thompson*, who was a Lieutenant in the *East India Company's* service on the *Madras* station, made his will in *India*, bearing date on the 20th of *August* 1775, and containing the following bequests: —

“ I give and bequeath to my father, *John Thompson*, of *Muchamoro*, near *Antrim, Ireland*, the sum of 5000 star or current pagodas of *Madras*, for his sole and proper use; but, in case of his death before the said sum of 5000 star or current pagodas be paid into his hands, then and in that case I will and bequeath the same to my uncle *Thomas Thompson*, of *Green Mount*, near *Antrim, Ireland*, to be by him justly, equally, and equitably divided and distributed among all my brothers and sisters alive, when this my last will and testament shall be put into execution.” He then gave two small legacies, one of which was to a charity in *Ireland*, and the other was payable in *India*; and proceeded thus: — “ I also appoint Lieutenant-Colonel *Russell*, Captain *Gibbings*, and Lieutenant *Knor* to be the joint executors of my will, to whom my whole property is to be paid; and I request that, after they have received what money is or may be due to me, whether by bonds or notes, as will be found in my *escritoire*, or by the amount of my effects, &c. &c. when sold by their authority, or rather as soon as a court of inquiry shall have taken an inventory of them, (for I request of the commanding officer, that, as soon as the said inventory is sent off to my executors, he will afterwards, as conveniently

veniently or as advantageously as he may think proper, order the whole of my things and effects to be sold),— I say I request that then my executors will, by the first good opportunity, remit the whole, I mean that part bequeathed and given to my father, or, in case of his death, to my uncle for the use of my brothers and sisters,” as well as the legacy given to the charity in *Ireland*, “to my good friends Messrs. *Allen, Marlar, and Boyd*, merchants in *London*, to be by them, and under the inspection of my executors, remitted as above mentioned to my father, &c. &c., as above described. Lastly and finally, I do direct, that, if, after my property is collected and effects sold, there remains any sum over and above what I have herein bequeathed, it shall be added to that which I have bequeathed to my father, or, in case of his death to my uncle, for the use, and to be divided amongst, my brothers and sisters, and is also to be remitted as above directed to my friends *Allen, Marlar, and Boyd*, in *London*. Should there be any deficiency, in my whole properties not amounting to the sums or legacies within mentioned or bequeathed them, then and in that case I desire such deficiency may be deducted from that sum above, which is herein bequeathed and given to my father; and not by any means, or on any account whatsoever, to infringe upon or to be deducted from either of the sums given and bequeathed by me herein for charitable uses.”

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He afterwards made the following codicil to his will:—
 “I further bequeath unto the child named *Martha Fletcher*, left to my care by its parents, the sum by them appropriated to its use, namely, 1000 star pagodas; the child, with the above 1000 pagodas, to be sent to *Europe* to the charge of my father, or, in case of his death, to my brothers and sisters jointly: as the sum of 1000 pagodas is to revert to me, should the said child die before

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before its amount is appropriated to its use, I do will and bequeath it in such case to my father, or, in case of his death, to my brothers and sisters alive, equally to be divided; and if it is to be remitted in the manner directed by my will for the sum left to my father, or, in case of his death, to my brothers and sisters."

The testator died in *India*, in 1779. The executors named in his will renounced the probate; and the testator's brother, *John Thompson*, who was in *India*, administered to his will, and afterwards died in *December* 1779. Between the making of the will and his death, the testator purchased one of the Nabob of *Arcot's* bonds for a sum of 7000 pagodas: and from the death of *John Thompson*, the administrator, until the year 1807, there was no personal representative of the testator; but, in 1807, the testator's brother, the Defendant *Hugh Thompson*, took out administration *de bonis non*, for the purpose of claiming the amount of the Nabob's bond from the commissioners appointed under the act of parliament for the liquidation of the Nabob's debts. This claim was admitted; and a large sum of *Carnatic* stock was appropriated in satisfaction of the bond.

The first administrator, *John Thompson*, had received some part of the testator's estate, but made no remittances to *Europe*, and died insolvent. Other small parts of the testator's estate were afterwards collected on account of the family, during the life of the father; but no remittance was ever made to him: and the Nabob's bond constituted the great bulk of the property.

After the death of the administrator, *John Thompson*, this bond was, in the year 1783, delivered over by General *Orr*, with whom *John Thompson* had deposited it,

it, to *Mr. Boyd* in *India*, who acted under a power of attorney for the father. The father died in 1796, when no money had been received on account of the bond; and, by his will, he gave his interest under the testator's will to two of his sons, who were Defendants to the suit.

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The Plaintiffs claimed in right of the other brothers and sisters of the testator; and filed their bill, contending, that, by the death of the father, before any part of the testator's property came to his hands, the gift over to the brothers and sisters took effect.

The Defendants, who claimed through the father, insisted, that the father's interest vested at the death of the testator; or that otherwise the delivery of the Nabob's bond by General *Orr* to the agent of the father, was equivalent to the payment of the money into his hands; or that, as the bond might have been sold during the father's lifetime, his interest was not to be defeated by the omission to sell it.

Mr. Sugden and *Mr. Koe*, for the Plaintiffs.

The testator has said in express terms, that, in case his father dies before he shall have actually received the money, the legacy shall go to the brothers and sisters living at the time when the trusts of the will are carried into execution: and the purpose, thus clearly expressed, must govern the construction which the will is to receive. The Court, it is true, will not, upon conjecture, impute to a testator the intention that a bequest is not to vest, till the property is realized and the money actually paid; but it is equally certain, that a testator may so dispose of his property, that none shall take, except those who live to receive with their own hands; and the only question is,

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is, whether the words of the will afford sufficient evidence, that he did not mean his bequests to vest absolutely, till the property was actually received? That doctrine is established by the decisions of Sir *William Grant* in *Bernard v. Montague* (a), *Elwin v. Elwin* (b), and *Gaskell v. Harman* (c): and though the decree in the latter case was reversed by Lord *Eldon*, the reversal proceeded exclusively on the ground, that the will did not manifest a clear intention that the property should vest only as it was received and converted into money. The decision of Lord *Thurlow* in *Hutcheon v. Mannington* (d) does not contradict or vary the doctrine: it shews merely, that ambiguous words are not a sufficient ground for imputing to a testator an intention of postponing the vesting of a bequest; and it was so regarded by Lord *Eldon*: "I admit," says Lord *Eldon* (e), "the soundness of the proposition, appearing by the report to have been stated by the Master of the Rolls, that, if a testator thinks proper — whether prudently or not — to say distinctly, shewing a manifest intention, that his legatees, pecuniary or residuary, shall not have the legacies or the residue, unless they live to receive them, in hard money, there is no rule against such intention if clearly expressed. But that would open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *Hutcheon v. Manning* (g), I admit I thought the meaning of those words was, *what they shall have received*; and I thought so after the decision. The use I have since made of that case is as an authority, that, if the words will admit of not imputing to the testator such an intention, it shall not be imputed to him. If that intention

(a) 1 *Mer.* 422.

(b) 8 *Ves.* 547.

(c) 6 *Ves.* 520. 11 *Ves.* 489.

(d) 1 *Ves.* jun. 365. 4 *Bro. C.* 491. n.

(e) 11 *Ves.* 497.

(g) 1 *Ves.* jun. 365.

intention can be supposed, it was natural in that case. The natural construction of that will was, if the legatee should die before the property should be actually remitted to him. But Lord *Thurlow*, looking to those considerations, which he expressed with considerable anxiety, the more perhaps as he perceived many of the bar did not go along with him, thought himself at liberty to put a construction upon the will, that by possibility might be put upon it; supposing an intention, that there should be an inquiry as to each and every part, when it might be said that it could have been received." In the present case, the words of the will shew plainly, that the legacy was meant for the personal comfort of the father, and if he died before it was remitted to him, other persons were to be substituted as the objects of the testator's bounty. The gift over is to take effect, "in case of the father's death before the 5000 pagodas be paid into his hands;" and that event actually took place. In the directions which are given with respect to remitting the property, it is clear, that, if the remittance cannot be made to the father personally, it is to be for the use of the brothers and sisters. In the codicil, the testator has disposed of a sum of 1000 pagodas, in the event of the death of *Martha Fletcher*; and it can scarcely be denied, that, if the father had died before *Martha Fletcher* had been sent, and the money remitted, to *Europe*, the testator's brothers and sisters, then alive, would have been entitled to the benefit of the bequest. This affords collateral support to that construction of the bequest of 5000 pagodas, which is according to the plain and literal meaning of the words.

With respect to the residue, the words "in case of his death" in the residuary gift must bear the same meaning as in the former part of the will—namely, in case of the father's death, before the money is paid into his hands.

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Mr. Pepys and Mr. Collinson, contra.

Hutcheon v. Mannington is expressly in point; the decision there, whatever speculations may be indulged in as to the ground on which it proceeded, affords the rule which the Court must follow here: and the general principle of construction leads to the same result. "The Court," says Lord *Eldon* (a), "has said, the best construction is generally to consider the interest vested and in hand, though, strictly, not collected for the purpose of enjoyment, as between the particular interests and the capital: and, if that is wise, the Court will not conjecture in favour of an intention against the general rule." He adds, it is true, that, if a contrary intention be clearly expressed, it must be carried into execution. But so far is this will from manifesting the intention on which the Plaintiffs rely, that the phraseology of it shews that no such intention was in the testator's mind. He manifests an anxiety that his property should be converted into money without loss of time, and remitted to his father by the first good opportunity; and he directs the child *Martha Fletcher*, with her fortune of 1000 pagodas, to be sent to *Europe*. When, therefore, he provides for what is to be done, in case of his father's death, he must have meant his death within such a period of time, as, in the common course of things, would be necessary for making the remittance to *England*; and it never could be his purpose, that the interest of the legatee should be dependent upon the accidental circumstance of the period which might elapse before the assets were realised; a period, which, without misconduct on the part of the executors, might be longer or shorter according to the mode in which they might think it prudent to act. In some cases there has been a manifest purpose, that legacies should not be paid

paid or a residue distributed, till a certain state of things should have arisen; and that circumstance, wherever it occurred, has always been very much relied on, when questions of this kind have been discussed, as a ground for postponing the period of vesting. *Edwin v. Edwin* (a), *Sitwell v. Barnard*. (b) Here there is no such purpose; the testator did not mean to delay the payment of the bequest to his father, till other objects were accomplished; on the contrary, his desire was, that the money should be remitted with all possible speed; and the delay, which prevented the father from actually receiving the money, though he survived his son by seventeen years, arose out of accidents which the testator never contemplated.

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The executors did not prove the will; and, during a period of nearly thirty years, there was no personal representative of the testator. Who can say, how far the speedy collection and due remittance of the assets may have been impeded by that state of things? Even if payment of the Nabob's bond could not have been enforced, it might have been sold; and the produce of the sale ought to have been remitted to the father, whose interest is not to be defeated by the omission to do what a personal representative might with propriety have done.

Though the father had not the money paid into his hands, he got, in one sense, possession of the assets, so as to give him a title, even according to the construction for which the Plaintiffs argue. *John Thompson*, the administrator, delivered the bond to Colonel *Orr*, and *Orr* delivered it to *Boyd*, who was the father's agent. This possession of the bond by the father, through his agent *Boyd*,

(a) 8 Ves. 547.

(b) 6 Ves. 520.



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Boyd, with the assent of the administrator, was equivalent to actual receipt of the legacy.

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In the case of *Hutcheon v. Mannington*, Lord *Thurlow* considered that the words used as to the death of the legatee were too vague to express a definite time upon which he could act with certainty: but Lord *Eldon*, who was counsel in that cause, has in the discussion of other cases frequently stated, that he was, at the time of the argument, and continued to be, of a different opinion, and that the only use he had made of that case was, to consider it as an authority for the principle, that the intention of the testator in similar cases must be clearly expressed.

Here, the property of the testator being in *India*, he has directed it to be collected by his executors, and to be remitted by them to merchants in *London*, and by these merchants remitted to his father in *Ireland*; and he has most clearly expressed his purpose, that, in case of his father's death before he should receive the remittance, the property should go over to his uncle for the benefit of his brothers and sisters. In this case there is no difference between the legacy of the 5000 pagodas, and the residuary estate, and the legacy of 1000 pagodas given by the codicil in case of the death of the infant. The condition as to the death of the father before the money is remitted, is plainly to be referred as well to the gift of the residuary estate, as to the legacy of 1000 pagodas given by the codicil.

It has been considered to be doubtful what the testator meant by the expression, that, in case of the death of his father, the legacy of 5000 pagodas should be distributed amongst all his brothers and sisters, who
should

should be alive when his will should be put into execution. It would have been reasonable to suppose, that he meant the same thing as he had just before expressed in other words with respect to his father, namely,—brothers and sisters who should be alive, when, in the execution of his will, the money should be remitted; but the codicil bears strongly upon this point. The infant's legacy of 1000 pagodas is given to the father, or, in case of his death, "to his brothers and sisters alive, equally to be divided," and to be remitted in the manner directed by his will. "*In case of the death of his father,*" plainly means *in case of his death before the money is remitted*: the inference therefore is, that the money is to be equally divided between his brothers and sisters who shall be alive when the money is remitted; and this same construction must apply with respect to the interest of the brothers and sisters in the legacy of 5000 pagodas and the residuary estate.

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It has been argued, that the delivery of the Nabob's bond by General Orr to the father's agent in *India* was tantamount to his possession of the money. But the father had no title to the bond, nor had General Orr any authority to deliver it. Neither could the bond have been sold.

If, however, the executors named in the testator's will, having taken upon themselves the administration of his estate, could, with reasonable diligence, have collected it, and remitted the produce to his father in his lifetime, I should be of opinion that the rights of the father could not be defeated by the accidental circumstances of this case: and, upon that principle, it must be referred to the Master to inquire, whether, if the will had been proved by the executors named in it, and reasonable diligence had been used by them, any

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and what part of the testator's property, given to the father, could have been remitted to him in his lifetime; with liberty to the Master to state any circumstances specially.

ROLLS.
Dec. 17.

The ATTORNEY-GENERAL v. The BISHOP
of ELY.

Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent and fine certain, of the tithes of a parish, had been regularly granted by the respective bishops of *Ely*, who were impropriate rectors of the parish, to the vicars for the time being.

THIS was an information filed by the Attorney-General, at the relation of the Rev. *Wm. White*, vicar of *Stradbroke*, in the county of *Suffolk*, against the Bishop of *Ely*, praying that the bishop might be decreed to grant to the relator a lease of the tithes of corn, grain, and hay throughout the parish of *Stradbroke* for a term of twenty-one years, from the 5th of *October* 1826, at an annual rent of 8*l.* and a fine of 63*l.*

On the 10th of *October* 1682, the then Bishop of *Ely*, who was, in right of his see, impropriate rector of the parish of *Stradbroke*, granted to the then vicar of that parish a lease of the tithes of corn, grain, and hay for a term of twenty-one years, at a yearly rent of 8*l.* and a fine of 100 marks. This lease, after reciting that the principal intention of granting the demise was to make some augmentation to the Vicar of *Stradbroke*, contained a covenant on the part of the lessee, that, in case he should cease to be such vicar during the term, he or his executors or administrators should, within sixty days afterwards, assign the lease to the next succeeding vicar, provided he should be presented to the vicarage by the Bishop of *Ely*. The lessee also covenanted to repair the chancel of the church during the term, to pay the reserved

reserved rent regularly, and to yield up the premises at the expiration of the lease. There was the usual clause of re-entry upon nonpayment of the rent.

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At the expiration of that lease, a similar lease was granted for the same term, and at the same rent and fine, by the then Bishop of *Ely* to the then Vicar of *Stradbroke*: and so from time to time, at the expiration of every term of twenty-one years, similar leases were granted by the Bishop of *Ely* for the time being to the Vicar of *Stradbroke* for the time being, at the same rent and fine; except that, in the lease granted in 1764, and in all succeeding leases, the fine paid was 69*l.* instead of 100 marks, which, however, was considered by the Court as substantially the same sum. The last of such leases expired on the 5th of *October* 1825.

The relator was presented by the Bishop of *Ely* to the vicarage of *Stradbroke*, in the month of *February* 1823, upon the death of the late vicar; and, in the month of *April* 1823, the then subsisting lease was duly assigned by the executors of the late vicar to the relator, in pursuance of the before recited covenant to that effect contained in the lease.

The relator founded his claim upon the letter of *Charles* the Second, dated the 1st of *June*, in the twelfth year of his reign*, and addressed to the bishops, deans, prebends,

* *Gibbon's Codex*, 756. By places where are no vicarages this letter the king ordered, —
“That no lease be granted of any rectories or parsonages belonging to your see, belonging to you or your successors, until you shall provide that the respective vicarages, or curates’
endowed, have so much revenue in glebe tithes, or other emoluments as commonly will amount to 100*l.* or 80*l.* per annum, or more, if it will bear it; and in good form of law, settle it upon them and their successors. And
where

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prebends, &c. recommending the augmentation of vicarages by the impropriate rectors, and upon the statute of the 29 C. 2. c. 8. *, which made such augmentations perpetual. He insisted, that it was to be presumed, that, in obedience to the king's letter, a lease, similar to that of 1682, had been made in 1661 by the then Bishop of *Ely* for twenty-one years, to the then Vicar of *Stradbroke*, at the same rent and fine; that, by force of the statute, the Vicar of *Stradbroke* acquired a perpetual right of renewal of such lease; and that the lease of 1682, and all subsequent leases, were granted by virtue of that right.

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where the rectories are of small value, and cannot admit of such proportions to the vicar and curate; our will is, that one half of the profit of such a rectory be reserved for the maintenance of the vicar or curate, as is agreeable to the rates and proportions formerly mentioned."

* By the second section of this act, it is enacted, "That all and every augmentation of what nature soever, granted, reserved, or agreed to be made payable, or intended to be granted, reserved, or made payable since the said 1st day of *June*, in the twelfth year of his said majesty's reign, or which shall at any time hereafter be granted, reserved, or made payable to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any vicar or curate by an archbishop, bishop, dean, provost, dean and chapter, or other ecclesiastical corporation, person or persons, shall be

deemed and adjudged to continue and be, and shall for ever hereafter continue and remain, as well during the continuance of the estate or term upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portion of the tithes shall be or come; which rectories or portion of the tithes shall be chargeable therewith, whether the same be reserved again or not; and the said vicars and curates respectively are hereby adjudged to be in the actual possession thereof, for the use of themselves and their successors, and the same shall for ever hereafter be taken, received, and enjoyed by the said vicars, curates, and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards."

The Defendant insisted that the language of the lease imported merely a voluntary grant, and contained no covenant of renewal; that the covenant on the part of the vicar to yield up the premises at the expiration of the term, and the clause for re-entry upon nonpayment of rent, were inconsistent with the right of renewal; that the statute of *Charles* applied only to cases, where, on the granting of a lease by an improper rector, either a part of the rent was reserved to the vicar, or it was understood and agreed that he should receive a part of the rent; that there was, in the archives of the bishopric, a book containing entries of all leases granted from 1628 to the 20th of *March* 1662, and other books containing like entries from 1674 to the present time, but no books referring to the period between 1662 and 1674; that the entries in such subsequent books were not in the form required by the statute of *Charles*; and that, if a lease had been granted in 1661 in obedience to the king's letter, it would have been entered in the book which extended to 1662, but that such book contained no intimation of any such lease.

Mr. *Sugden* and Mr. *Roupell*, for the relator.

Mr. *Horne* and Mr. *Lloyd*, for the Defendant.

This lease does not correspond with the augmentations contemplated by the letter of *Charles* the Second, and the subsequent act of parliament. The letter directs that no lease be granted of any rectory, until provision be made for the vicar, and that, where the rectory is of small value, one half of the profit be reserved for the vicar's maintenance. The 29 *Car.* 2. c. 8. recites, that ecclesiastical persons, upon the renewing of leases of rectories or tithes, had made, or might thereafter make reservations beyond the ancient rent, to the intent that the same might be payable to the vicars in augmentation of their

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their endowments: and it enacts, that the augmentations shall be perpetual, and that the vicars shall have remedy for the same by distress or action of debt. The legislature, therefore, had in view, not a lease granted to a vicar, but a lease granted to a third person, reserving rent payable to the vicar: and that construction of the act is strengthened by the tenor of the eighth, ninth, and tenth sections. This lease being a demise of the rectory, or at least of the rectorial tithes to the vicar, does not come within the scope of the statute or of the royal letter.

The fourth section of the act provides, that "every lease or grant, wherein any such augmentation is made," shall be registered in a certain form. Had this lease been an augmentation of the vicarage of *Stradbroke*, within the meaning of the act, it would have been registered: but there is no trace of any such registry; nor is there even any entry of the lease in the archives of the see; and, therefore, the claim of the Plaintiff cannot be sustained without presuming that every successive bishop and every successive registrar of the diocese have neglected their respective duties.

The form of the lease is not compatible with the hypothesis of its being a perpetual augmentation. There is no covenant for perpetual renewal. If a vicar were presented by any person other than a Bishop of *Ely*, — as for instance, in the event of a lapse, — the tithes would unquestionably be severed from the vicarage: if a vicar were unable to pay the fine for renewal, he could not possibly claim a demise of the tithes: or, if he failed in the due payment of rent, the bishop would, by the very form of the lease, be entitled to re-enter. These are characteristic circumstances, which would not have been found in the lease, if the tithes had been united inseparably with the vicarage.

Mr.

Mr. Sugden, in reply.

Whether the tithes be demised to a third person, reserving a rent of which part is payable to the vicar, or whether they are demised to the vicar, reserving a rent payable to the bishop, the result is the same. In either case a provision is made for the vicar out of the profits of the rectory; and, by the statute of *Charles*, every augmentation, granted, reserved, or agreed to be made payable, is rendered perpetual.

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The objections founded on the form of the lease, lose all their weight, when we look back to the origin of augmentations like this. When the royal letter was issued, the Bishop of *Ely* could not have made any grant or demise of the tithes, either to the vicar or any other person, other than for the term of one and twenty years, or three lives, reserving the accustomed rent^(a); and the payment of the rent would necessarily be enforced by the usual power of re-entry. The act of *Charles* did not authorise the bishops and other ecclesiastical persons to make perpetual grants; but it gave perpetual endurance to the grants which they had made or might thereafter make, though, in themselves, such grants would have continued only for a limited term of years. It thus became necessary for the purposes of the act to continue the machinery in the old form. The covenants, which have been the subject of the Defendant's criticism, were all necessary and proper, when the lease was first granted by way of augmentation; and, after the statute, they were necessarily retained in the succeeding leases; for to have omitted them would have taken away from the see profits of which it was in possession at the time of the act, and given to the vicarage a beneficial interest which the bishop had never annexed to it. It is true, that, if the lessee failed to pay the rent, the bishop might re-enter: still,

(a) 1 *Edw.* c. 19.

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still, however, he would in the view of this Court, be a trustee of the surplus income of the tithes, after retaining the rent and costs, for the vicar; and he would be compelled to grant a renewal, on the vicar paying the rent and entering into the necessary stipulations.

The objections, which have been insisted on, would all have applied with equal force to a lease of the tithes to a third person, reserving a rent of which part was made payable to the vicar. Such a lease would have contained a clause of re-entry on nonpayment of the rent; but if the bishop had re-entered, he must still have made the proper payments to the vicar: the destruction of the legal interest of the lessee would not have affected the equitable rights of the vicarage.

Under these circumstances, the succession of leases which have been granted by the Bishops of *Ely*, and the constant enjoyment of the tithes in question by the vicars of *Stradbroke* upon terms which have never varied in any material respect, create a presumption, that a lease, similar to that which has lately expired, was, shortly after the date of the royal letter, granted by the then Bishop of *Ely* to the then vicar of *Stradbroke*, by way of augmentation of the vicarage. *Roe v. Ireland.* (a)

The MASTER of the ROLLS.

In 1682, the then Bishop of *Ely*, as inappropriate rector of *Stradbroke*, granted to the vicar of *Stradbroke* a lease for twenty-one years of the tithes of corn, grain, and hay in and throughout the parish of *Stradbroke*, at a rent of 8*l.* and a fine of 100 marks. At the expiration of that lease, a similar lease was granted to the then vicar at the same rent and fine; and so from time to time, at the

(a) 11 *East*, 280.

the expiration of every lease, similar leases have been granted, at the same rent and on the same fine, or what is substantially the same fine, by the Bishops of *Ely* for the time being to the successive vicars of *Stradbroke*, until the last of such leases expired on the 5th of *October* 1826. These leases comprised the whole profits of the impropriate rectory; and it must be presumed, that what has been so long enjoyed by one party and conceded by the other, was founded on a rightful title, and could not have depended upon the mere caprice or pleasure of the bishop for the time being. The vicar founds a title on the letter of *Charles* the Second, dated the 1st of *June* 1661, addressed to bishops, deans, and other ecclesiastical persons who might happen to be impropriate rectors, and urging the augmentation of vicarages, and on the subsequent statute of the 29 *Car. 2.* And the first question is, whether, by that letter and statute, a rightful title to a perpetual renewal of such leases could be conferred.

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The material words of the letter as to this point are as follows: — “Our will is, that no lease be granted of any rectories or parsonages belonging to your see, or belonging to you and your successors, until you shall provide that the respective vicarages, or curates’ places, where there are no vicarages endowed, have so much revenue in glebe tithes or other emoluments as commonly will amount to 100*l.* or 80*l.* per annum, or more if it will bear it.” Under these words no question can arise, that an augmentation, not by reserving a part of the rent to the vicar, but by an actual grant or lease of the tithes, or any part of them, would have been a good augmentation within the view and intention of the king’s letter. The 29 *Car. 2.* is entitled “an act confirming and perpetuating augmentations made by ecclesiastical persons to small vicarages and curacies.” The
preamble,

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preamble, after reciting the king's letter, refers to augmentations made by reservations of part of the rent, where the vicar had no convenient remedy for the recovery thereof; and the provisions are principally directed to such cases. But the first enacting clause of the statute expressly states, "that all and every augmentation of what nature soever, granted, reserved, or agreed to be made payable since the 1st of *June*, in the twelfth year of his majesty's reign," (the date of the king's letter,) "shall be deemed and adjudged to continue and be, and shall for ever hereafter continue and remain, as well during the continuance of the estate or term upon which such augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portions of tithes shall be or come." Now, although the particular provisions of the act are applied to the cases of reservation of rent, it is clear that the general intent of the act is to make perpetual all augmentations whatsoever, which took place in consequence of the king's letter. It is probable that the common mode of augmentation was, by reservation of rent; and, without the aid of the particular provisions of this statute the several vicars would have had no legal remedy for their portion of such rents: but where the augmentation was made by a lease of tithes, the vicars required no aid from the legislature, except to confer that perpetual right of renewal which the express words of this statute give. If, therefore, a lease, similar to that of 1682, had been granted in pursuance of the king's letter, it is clear that the 29 *Car. 2.* gave to the vicar a perpetual right of renewal of such lease.

The remaining question is, whether, in the absence of direct evidence of the fact, it is reasonable to presume in this case, that a similar lease had been granted in
 pursuance

pursuance of the king's letter. The coincidence of time is remarkable. The king's letter is dated the 1st of *June* 1661. A similar lease, granted in obedience to it, would probably have commenced at *Michaelmas* 1661, and determined at *Michaelmas* 1682, which is the commencement of the lease in question. The lease itself expresses, that it was made with the intention of granting an augmentation to the vicar.

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For the Defendant, it is argued, that the covenants in the lease do not fit the case of perpetual renewal. The answer is, that the first lease was a temporary grant only, and had, therefore, the proper form of such grant; and, the statute conferring only the perpetual right of renewal, the form must necessarily remain the same.

The objection that a lease in 1661 is not to be presumed, because it is not noticed in the Bishop's book which extended to 1662, is of little weight. The lease, though commencing retrospectively in *October* 1661, might not have been actually executed till after *March* 1662. But if the books had been regularly preserved, and no entry of any lease of 1661 had been found in them, I am of opinion that such omission would have had no weight in opposition to the presumption of right, which arises from an uninterrupted possession of nearly 150 years, and that it would have been the duty of the Court to come to the conclusion, that a lease, similar to that of 1682, had been previously granted in obedience to the king's letter, and that the 29 *Car.* 2. conferred upon the vicars for the time being a perpetual right of renewal of such lease.

Declare, therefore, that the relator is entitled to a new lease according to the prayer of the information; and the Defendant must pay the costs of the suit.

1827.

ROLLS.

Dec. 17.

FIELD v. SOWLE.

Where a *feme covert*, having separate property, joins in a security for money advanced to her husband, the Court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage.

The death of the husband, after the filing of the bill, and before the hearing, makes no difference.

If the *feme covert* insists upon the increase of undue influence by the husband, she must prove it; and it is not for the Plaintiff to prove a negative.

BY a settlement made previous to the marriage of the Defendant *Sarah Sowle* with the Defendant *Charles Sowle*, he, *Charles Sowle*, covenanted with the Defendant *Richard Winkles*, who was named as a trustee on the part of the intended wife, that he would join with her in conveying and surrendering certain freehold and copyhold property, to which she was entitled, to the use of *Richard Winkles*, his heirs and assigns, upon trust to pay the rents and profits for the sole and separate use of the intended wife during the coverture, with power to her to appoint the property by any deed or other writing, or by her last will and testament executed in manner therein mentioned.

After the marriage, the Defendant *Sarah Sowle* joined her husband in a promissory note to the Plaintiff *Field* for the sum of 130*l.* advanced by him to the husband. The Plaintiff *Field* afterwards advanced other sums to the husband, so as to make up the full sum of 220*l.* The wife did not join in any security for the subsequent advances; but she wrote certain letters to the Plaintiff, which were insisted upon as amounting to an agreement to charge her separate estate with the full sum of 220*l.* The bill prayed that the whole sum due to *Field* might be raised by sale or mortgage of Mrs. *Sowle's* freehold and copyhold estate.

The Defendant, *Sarah Sowle*, in her answer had said, that she joined in this transaction, not of her own free will,

will, but under the influence and by the compulsion of her husband; but no evidence was given on her part.

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Mr. Sugden and Mr. Parker, for the Plaintiffs.

Mr. Bickersteth, for Sarah Sowle.

Mr. J. Russell, for the Defendant Winkles.

The Defendant, *Charles Sowle*, was dead at the time of the hearing.

Upon the argument, the MASTER of the ROLLS suggested, that he knew of no case in which it had been decided, that a court of equity would compel a feme covert specifically to perform a contract for sale or mortgage; and that the Court acted upon her separate property by considering a security, in which she joined, as an appointment.

The counsel for the Plaintiff then confined their claim to the 130*l.*; and a question was made, whether the 130*l.* was to be raised by sale or mortgage of the estate, or from the rents and profits only.

The MASTER of the ROLLS.

The signature of the promissory note by the Defendant *Sarah Sowle* is *prima facie* evidence to charge her; and it is upon her to repel the effect of her signature by evidence of undue influence, and not upon the Plaintiff to prove a negative. The death of the husband before the hearing makes no difference in the case.

The Plaintiff can have no other equitable relief than such as the transaction entitled him to at the time it took place. The Court acts upon the security of the wife,

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wife, not as an agreement to charge her separate property, but as an equitable appointment under the settlement. Without the consent of the Defendant, I cannot order the property to be either sold or mortgaged; and the decree must be for satisfaction out of the rents and profits.

Rolls.

Dec. 19

FEREDAY v. WIGHTWICK.

The petition of a Defendant prayed that he might be at liberty to examine one of the Plaintiffs as a witness: the Plaintiffs were co-partners, and had a common interest adverse to the petitioner: the petition was dismissed with costs.

WILLIAM TURTON, by indenture dated the 26th of *February* 1814, assigned twenty shares of divers leasehold coal mines and hereditaments to trustees upon trust to secure to *Wightwick* an annuity, for which he had paid to *Turton* 4000*l.* The bill was filed by fifteen persons, partners with *Turton* in the *Moat Colliery Company*, who claimed a lien on these shares for monies due from *William Turton* to the partnership; and one of the objects of it was, to assert a priority, in respect of that lien, over the assignment to *Wightwick*.

Wightwick by his answer stated, among other things, that the assignment of the 26th of *February* 1814 was prepared by the Plaintiff *Henry Smith*, who was an attorney, and that it was executed in his presence, and subscribed by him as an attesting witness; that *Richard Smith*, another of the Plaintiffs, had advised *William Turton* to raise the sum of 4000*l.* by the grant of the annuity, and had been present at the house of *William Smith* on several occasions, when the negotiations for the grant of the annuity were going on; that the Plaintiffs *Richard Smith* and *Henry Hudson* were, at the time of the execution of the assignment, in the house where
it

it was executed, and received 2000*l.*, which they knew to be part of the money advanced by *Wightwick* as the consideration for an annuity secured on *William Turton's* twenty shares of the premises before mentioned.

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The cause being at issue, *Wightwick* presented a petition, praying that he might be at liberty to exhibit interrogatories for the examination of the Plaintiffs *John Turton Fereday*, *Henry Hudson*, *Henry Smith*, *Richard Smith*, and *William Spurrier*, and of the Defendant *William Turton*, as witnesses on his behalf, saving all just exceptions. The petition, and the affidavit filed in support of it, stated, that he could not safely proceed to a hearing without the evidence of those Plaintiffs; that they could prove the several facts and circumstances stated in his answer with respect to the preparation and execution of the assignment, the advice under which *Turton* had acted in granting the annuity, the knowledge which several of the Plaintiffs had of that transaction, the purpose for which the 4000*l.* was raised, and the persons to whom the money was ultimately paid; and that those facts and circumstances could not be proved by any other evidence.

Mr. *Wilson*, for the petition.

Phillips v. The Duke of Buckingham (a), *Armiter v. Swanton* (b), *Mayor and Aldermen of Colchester v. —* (c), *Troughton v. Getley* (d), *Walker v. Wingfield* (e), are authorities which prove that the Court may make the order which is sought; and, in the present case, such an order is absolutely necessary for the purposes of justice.

Mr.

(a) 1 *Vern.* 227.

(d) 1 *Dick.* 382

(b) *Amb.* 393.

(e) 15 *Ves.* 178.

(c) 1 *P. Wms.* 596.

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Mr. Rolfe, for all the Plaintiffs.

It is contrary to all rule, that a defendant should be able to examine a plaintiff as a witness against his consent. He may file a cross-bill, if he pleases, or a bill of discovery; and what one plaintiff admits in his answer will be evidence against all the complainants; for, by joining as plaintiffs, they render themselves liable to be bound by the admissions of each other; but he has no right to examine any of them on interrogatories. In *Walker v. Wingfield*, the plaintiff, whom it was proposed to examine, consented to the order; and that must have been the case likewise in *Troughton v. Getley*; for Lord Northington is there said "to have laid it down as a rule in law and equity, that a defendant may examine a plaintiff as a witness." He states the rule to be the same here as at law; now at law, though a defendant may examine a plaintiff who chooses to be a witness, who ever heard of a plaintiff being compelled to give evidence against himself? The doctrine, which he lays down, would not have applied, if the plaintiff, to whom the motion related, was unwilling to be examined. Besides, *Troughton v. Getley* has always been considered as of very dubious authority. It is stated to have been doubted at the time by almost the whole bar, and was afterwards reprobated by Lord Thurlow. (a)

The order is proposed to be taken, "saving just exceptions." It will therefore be nugatory, for all the Co-plaintiffs have an interest, and that interest will disqualify them as witnesses.

Mr. O. Anderson, for other parties in the same interest.

Mr. Wilson, in reply.

We propose to examine these Plaintiffs against their interest;

(a) 2 Dick. 800.

interest; and if we are willing to run the risk of calling such witnesses, no objection can be raised on that ground. The effect of the order will be to get rid of the objection which arises to their being witnesses, from the circumstance of their being parties on the record; and that objection is one, which, the authorities prove, the Court will interfere to remove.

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The MASTER of the ROLLS.

There is no authority which would justify me in making the order prayed for; and it would in effect be to dispense in all cases with a bill of discovery. In *Armiter v. Swanton* the plaintiffs were trustees; and in *Walker v. Wingfield* the plaintiff consented to be examined, which removed the objection to compelling a party in a suit to be a witness against himself. Let the petition be dismissed with costs. *

* *Eglantyne v. Collis*, 31st October 1806. On the application of Plaintiffs, and the Defendants consenting, an order was made to examine Co-plaintiffs as witnesses. Reg. Lib. 1807. A. 1281.

1827.

Nov. 3. 7.

JONES v. MUDD.

A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits, only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase.

BY articles of agreement bearing date the 14th of November 1820, and made between *Jones* of the one part, and *Mudd* of the other part, *Jones* agreed to sell and *Mudd* agreed to purchase a certain farm at the sum of 4150*l*. It was stipulated that *Jones* should, within four months, deliver unto *Mudd* a satisfactory abstract, and deduce a marketable title to the estate; and that he should, on or before the 11th of *October* then next, upon receiving from *Mudd* the sum of 4150*l*., or security for the same, effectually convey to him the farm, and deliver up all deeds and evidences relating to it. *Mudd*, on the other hand, agreed, that, upon such conveyance and assurance being executed and perfected, and upon receiving possession of the estate on the 11th of *October* then next, he would pay unto *Jones* 1150*l*., and would execute to him a valid mortgage of the premises contracted to be purchased, as a security for the sum of 8000*l*. and interest at 5 per cent. *Jones* was to be entitled to the rent of the farm till *Michaelmas* 1821, and was to clear all outgoings up to that time.

After the delivery of an abstract pursuant to the agreement, *Mudd* refused to perform the contract, on the ground that a good title to the estate was not made out; and *Jones*, in *February* 1823, filed his bill for specific performance.

In *December* 1823, an order was made, referring it to the Master to inquire whether a good title could be made to the farm; and in case the Master should find
a good

a good title could be made, he was to inquire, when it was first shewn that such good title could be made.

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v.
MUND

The Master certified, that he was of opinion that a good title could be made to the estate, and was first shewn on the 15th of *January* 1827.

By an order made on petition in *April* 1827, the Vice-Chancellor ordered the agreement to be specifically performed; and he directed that the Defendant should pay and secure to the Plaintiff the sum of 4150*l.* with interest at 5*l.* per cent. from the 15th of *January* 1827, deducting thereout the rents and profits received by the Plaintiff, which had accrued since the 15th of *January* 1827, or which might accrue or be received by him before the execution of the assurances thereafter directed to be made. The costs of the suit up to the date of the Master's report were to be borne by the Plaintiff.

The Plaintiff appealed from this order, and insisted, that interest ought to have been computed on the purchase-money, not from the 15th of *January* 1827, but from the 11th of *October* 1821; the Defendant being, on the other hand, entitled to an account of the rents accrued due from that time.

Mr. Treslove and Mr. Rolfe, in support of the appeal.

Where the specific performance of a contract for the purchase of an estate is ultimately decreed, the estate is considered in equity as belonging to the purchaser from the date fixed by the agreement for the completion of the purchase, and the money is considered as having become the property of the vendor from the same time. And from this principle the rule is derived, that from that

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time the vendor must account for the rents and profits of the estate, and is entitled to receive interest on his purchase-money. *Harford v. Purrier*. (a) "The usual course," says Sir Thomas Plumer, in *Burton v. Todd* (b), "is, that the purchaser shall receive the rents, and pay 4*l.* per cent. interest on the purchase-money, a practice rather hard, where the delay is not caused by him: the rents seldom yield 4*l.* per cent., and the purchaser, after having been deprived of the enjoyment of his estate, receiving it at last in a worse condition. That rule was founded upon the principle recognized by courts of equity, that from the moment of the contract, although no purchase-money is paid, the estate is to be considered as the property of the purchaser, and the purchase-money, the property of the vendor." The rule is laid down in text-books of the highest reputation as settled beyond doubt (c); and there is no trace of authority in support of the principle on which this order proceeds, — namely, that, where a time is fixed for the completion of the contract, and the purchaser does not shew a good title till a time long subsequent, interest is to run from the latter period, and not from the former. In order to protect a purchaser from paying interest, it has always been deemed necessary that he should shew not only that the delay in the completion of the purchase was occasioned by the default of the vendor, but that the purchase-money had been lying dead. In general, too, he must have given notice to the vendor that the money was unproductive; and, notwithstanding such notice, if it appeared that he made any use of the money, or derived any advantage from it, or that it was not *bonâ fide* appropriated to the purchase, he would be charged with interest. In the present case, there was an express contract, that, on the 11th of *October* 1821, part of the money

(a) 1 *Mad.* 538.(b) 1 *Swanst.* 360.(c) *Sugden's Vendors and Purchasers*, 479, 480.

money should be paid, and a security given for the residue and 5*l.* per cent. interest; and the Court has no power to relieve the purchaser from the effect of that stipulation.

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MUDD.

Mr. Sidebottom, contra.

The true doctrine of the Court on this point has been stated by Sir John Leach in *Esdaile v. Stephenson* (a):—
“Where there is no stipulation as to interest, the general rule of the Court is, that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time; and shall from thence pay interest at 4*l.* per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court, therefore, gives the vendor no interest, but leaves him in possession of the interim rents.” His Honor followed the same rule in a late case of *Monk v. Huskisson*.* Here it is clear

(a) 1 Sim. & Stu. 122.

* In the case of *Monk v. Huskisson*, the contract, which was dated the 30th of June 1819, and was entered into by the commissioners of His Majesty's woods and forests and land revenues, as purchasers on behalf of His Majesty, contained the following stipulations:—that the vendors would shew a good title and execute a conveyance, on or before the 25th of December

then next; that the crown, on payment of the purchase-money, should be entitled to the rents from that day; and that, “if, by reason of any unforeseen or unavoidable obstacles, the conveyances and assurances aforesaid cannot be prepared or perfected for execution on the said 25th of December, the said William Huskisson, William Dacres Adams, and Henry Dawkins, or

A contract of purchase contained a stipulation, that if by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser

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clear that the delay in completing the contract was occasioned by the vendor; for till the 18th of *January* 1827 he did not shew a good title; and, accordingly, he has

should from that day pay interest at 5*l.* per cent. on his purchase-money, and be entitled to the rents and profits of the premises: the vendor did not show a good title till long after the specified day: Held, that he was not entitled to interest except from the time when a good title was first shown.

or the commissioners for the time being of His Majesty's woods, forests, and land revenues, shall, by or out of the land revenues of the crown, pay interest for the said purchase-money from the said 25th of *December* (from which time His Majesty is to be entitled to the rents and profits of the said premises) after the rate of 5*l.* per cent. per annum, until the completion of the said assurances."

Objections to the title being taken on the part of the purchasers, the vendors filed a bill for specific performance; and, in *May* 1822, a decree was made, referring it to the Master to inquire, whether the plaintiffs could make a good title, and, if the title was good, when it was first shewn, that such good title could be made.

The Master, by his report, certified in favor of the title, but found that a good title was not shewn till after the decree.

1827.

April 27.

The defendants excepted to the report; and, the cause

coming on to be heard before Sir *John Leach* then Vice-Chancellor, upon the exceptions and for further directions, His Honor over-ruled the exceptions (a), and decreed specific performance, but gave the plaintiffs interest only from the time when a good title was shewn.

Before the decree was drawn up, application was made to His Honor at the Rolls on behalf of the plaintiffs, for permission to have the cause put into the paper, for the purpose of having the minutes varied in the direction as to interest. Permission was given; and the question as to interest was discussed.

Mr. *Sugden*, for the Plaintiffs, contended, that, even if the general rule were that a purchaser was to take the rents and profits and pay interest only from the time when a good title was shewn, the express stipulations of the contract excluded its application to the present case. The contingency of the conveyance not being perfected by

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4

July

(a) The decision on the question of title, raised by the exceptions, is reported in 1 *Sim.* 280.

has been ordered to pay the Defendant's costs of suit up to that time. The stipulation in the contract, that, on the 11th of *October* 1821, 1150*l.* should be paid, and a security given for 3000*l.* and interest at 5*l.* per cent. was not absolute: it was dependent on a condition to be performed by the vendor; for the payment was to take place only upon having a conveyance of the estate executed and receiving possession; and, till the 15th of *January* 1827, the vendor was not in a situation to require the purchaser to take possession or to accept a conveyance.

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The LORD CHANCELLOR expressed his assent to the rule as stated by Sir *John Leach* in *Esdaile v. Stephenson*, and dismissed the appeal.

Nov. 7.

by the 25th of *December* 1819 was contemplated; and it was expressly provided, that, in that case, the crown was to pay interest at 5*l.* per cent. from the 25th of *December* 1819 until the completion of the assurances, and was to be entitled to the rents and profits accruing during the same period.

vendor was not entitled to interest before the time when a good title was shewn; and he stated that the effect of the stipulations, which had been relied on, was, not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest, to which the vendors might be entitled, at 5*l.* per cent., instead of 4*l.* per cent.

The MASTER of the ROLLS adhered to the rule, that the

1827.


Nov. 8.

NANNY v. EDWARDS.

A first application by a mortgagor to enlarge the time for payment of the mortgage money refused.

THE bill was filed in 1824, by a second mortgagee for 5000*l.*, to redeem a first mortgagee for 7000*l.*, and to foreclose the mortgagors, and a third mortgagee for 3000*l.* The decree for redemption and foreclosure was made in *May* 1826. The Master's report of what was due on the mortgages was made in the following *December*. The Plaintiff redeemed the prior incumbrancer; and, in *June* 1827, the second report was made, stating the sum due to the Plaintiff to be upwards of 14,000*l.*, and fixing a day for the payment of it.

A motion, on behalf of the mortgagor, to enlarge for three months the time fixed for the payment of the mortgage-money, had been made before the Vice-Chancellor, but was refused.

It was now renewed before the Lord Chancellor.

The motion was supported by an affidavit that the estate was worth upwards of 20,000*l.*; that the mortgagors had endeavoured to sell the estate; and that they hoped to raise the money within three months.

On the other hand, an affidavit, filed in opposition to the motion, stated, that the rental of the property was only 550*l.* a year, and that the Plaintiff had been obliged to borrow money in order to pay off the first incumbrancer.

Mr.

Mr. *Wyatt*, for the motion.

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It is the habit of the Court to enlarge the time for the payment of mortgage-money. This enlargement is usually granted thrice; and has even been granted four times. *Edwards v. Cunliffe.* (a) Here the time has not been enlarged at all; and there is no instance of refusing such an application, when no previous indulgence has been granted to the owners of the equity of redemption. As we must pay the interest now due and the costs, the situation of the mortgagee will be rendered better rather than worse.

Mr. *Sugden* and Mr. *Duckworth*, *contra*.

The LORD CHANCELLOR.

The Court, in order to induce it to enlarge the time for redemption, must have some reason assigned (though it does not require a very strong one), why the mortgagor did not pay the interest, principal, and costs at the time appointed by the report. In this case no excuse for his default is stated.

The motion was refused with costs.

(a) 1 *Mad.* 287.

1827.

Nov. 3. 5.

BROWN v. DE TASTET.

It is competent to the Court, on the hearing of exceptions, at the same time it allows an exception taken by the Defendant, and directs the Master to review his report generally, to order the Defendant to pay a sum of money into Court, if it is satisfied that ultimately that sum will be found due from the Defendant.

UNDER a decree directing intricate partnership accounts to be taken, the Master made a report, according to which a very large sum would have been due from the Defendant; and exceptions were taken by both parties.

Some of the exceptions having been argued, Lord *Eldon* made an order, which, after allowing one of the exceptions, and declaring that it was unnecessary to pronounce any judgment on the other exceptions, referred it back to the Master to review his report, and directed that the Defendant should pay into Court upwards of 18,000*l*.

There was no notice of motion for payment of money into Court.

A motion was made on behalf of the Defendant, that the order for the payment of the money into Court might be discharged.

Mr. *Heald*, Mr. *Pepys*, and Mr. *Koe*, in support of the motion, contended, that it was contrary to established practice to order money to be paid into Court, when exceptions were allowed, and the Master was directed to review his report generally. The report not being confirmed, there was no ground upon which the order could proceed; and such an order could not be made, even if it were right in substance, unless upon motion, or at the hearing on further directions.

Mr.

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Mr. *Horne* and Mr. *Pemberton*, *contra*.

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The order was right in substance; because Lord *Eldon*, though he could not confirm the report, was satisfied that ultimately a much larger balance would be found due from the Defendant; and it was competent to the Court, on hearing exceptions, to make any order which the justice of the case might require. In the present case, considering the advanced age of the Defendant, and the great delay which would necessarily occur in reviewing the report, it was reasonable that a sum, which, in every view of the accounts, would belong to the Plaintiff, should be secured in the mean time.

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v.
DE TASSER.

The LORD CHANCELLOR held that the order was not irregular, and refused the motion.

Afterwards the order on the exceptions was reheard upon the merits.

1828.
May.
June.
July.
July 5.

The LORD CHANCELLOR stated, that he was unable, in the present stage of the cause, to arrive at any safe conclusion with respect to the probable result of the accounts on the principle on which the Master was now to proceed in taking them; and he therefore reversed so much of Lord *Eldon*'s order as directed the money to be paid into Court.

1827.

July 28.
Nov. 12.

MONTAGUE v. HILL.

Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee.

Qu. Whether the proceedings of the assignee in the name of the obligee are stayed by an injunction, which restrains only the assignee, his counsellors, and agents.

MONTAGUE was the obligor in a bond, in which *Hill* was the obligee. *Hill* assigned the bond to *Pritchard*; and, after *Pritchard's* death, his personal representative, *Smith*, brought an action on the bond in the name of *Hill* against *Montague*, and obtained judgment.

Montague then filed his bill against *Hill*, *Smith*, and other Defendants, impeaching the bond on the ground of fraud, and stating circumstances which, as between *Montague* and *Hill*, were represented as constituting a case of equitable satisfaction. The prayer was, that certain accounts might be taken; that *Hill* might be restrained from proceeding in the action, and from bringing any other action; and that the other Defendants might be restrained in like manner from proceeding in the action in the name of *Hill* or otherwise, and from bringing any other action in his name or otherwise.

The common injunction issued for want of answer; but it issued only against *Hill*, his counsellors and agents, and did not name the other Defendants.

Hill answered: the other Defendants put in their answers: and, after a considerable lapse of time, *Smith* obtained an order *nisi* for dissolving the injunction, which recited that the Defendants had put in full answers to the Plaintiff's bill, and denied the whole equity thereof.

Difficulties

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HILL.

Difficulties having occurred in drawing up the order, the situation of the cause was mentioned to the Vice-Chancellor; and it was stated that His Honor, after communicating with the registrar, had been of opinion, that *Smith*, in order to get rid of the injunction, ought to give a special notice of motion. Such a notice of motion was accordingly given. The motion to dissolve the injunction absolutely was made, both on the special notice and on the order *nisi*; and the Vice-Chancellor ordered the injunction to be dissolved.

That order the Plaintiff now moved to discharge.

Unless the answer of *Hill* were allowed to be read, there was no ground for the injunction; and the substantial question was, Whether the answer of *Hill* could be read against *Smith*, for the purpose of supporting an injunction to restrain an action which was proceeding in *Hill's* name?

Mr. *Shadwell* and Mr. *Davies* argued, that, as the action was brought in *Hill's* name, and as the injunction was against *Hill*, it could be dissolved only upon *Hill's* answer; and the Plaintiff had therefore a right to avail himself of the statements in that answer for the purpose of continuing the injunction.

Mr. *Horne* and Mr. *Simpkinson*, *contra*, insisted, that, as the motion was made on behalf of *Smith*, and as the action was in fact the action of *Smith*, though in point of form he was compelled to bring it in *Hill's* name, the answer of *Smith* was the only answer to which the Court could look, in order to determine whether he should be restrained from asserting his legal rights.

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MONTAGUE

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The LORD CHANCELLOR.

On the answer of *Smith* it appears that there is no ground for continuing this injunction, so far as he is concerned. He denies any knowledge of the matters stated as grounds of equity in the bill; and he adds this material fact, that, successive applications having been made to *Montague* for payment of the bond, he did not pretend to have any defence to the demand, but merely prayed time and indulgence. If, therefore, an injunction had issued to restrain *Smith* from proceeding in the name of *Hill*, that injunction must have been dissolved.

The injunction was against the proceedings of *Hill* individually and by name; and if the action had been really *Hill's* proceeding, it would have been a matter of course that the Court should look at the facts disclosed in his answer. But in looking at his answer, I find he says that he has had no concern with the action, and that it has not been brought with his privity and consent. There appears, therefore, to be no reason, why, so far as relates to *Smith*, this injunction should be continued.

It may admit of considerable doubt, whether, notwithstanding this injunction, *Smith* might not have continued his action; for, as assignee of the bond, he had a right to bring it, and it was not brought with the privity of *Hill*.

The injunction was dissolved.

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JOHN BALDERS by his last will devised his manors, lands, and tenements in certain parishes in the county of *Norfolk*, subject to a term of 500 years, and the payment of certain annuities, to his son *Charles Morley Balders* and his assigns during his life, with power to limit or appoint them, or any part of them, for a jointure to a wife. The trusts of the term were to pay 100*l.* a year to *Charles Morley Balders*, till he attained the age of twenty-one, and then 200*l.* a year, till he attained the age of thirty; and to raise a sum of 3000*l.* and another sum of 2000*l.* for the testator's daughter. *Charles Morley Balders* completed his thirtieth year on the 16th of *April* 1801.

A. being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument, by which *A.* covenants not to sell or incumber the lands comprised in the term, and it is declared, that,

In 1803, previous to and in consideration of a marriage then intended between *Charles Morley Balders* and *Mary Hare*, a daughter of Lord *Ennismore*, an indenture, bearing date the 15th of *January*, was executed by *Charles Morley Balders* of the first part, Lord *Ennismore* and his daughter of the second part, and trustees of the third part, by which, after reciting that Lord *Ennismore* had paid 9200*l.* to the trustees, it was declared that 6200*l.*, part of that sum, was to be paid to *Balders* for his own use, and the remaining 3000*l.* was to be invested in the public stocks, or on the security of the term of 500 years, upon certain trusts for the husband

if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of *A.* or his wife or children or issue: the covenant and this proviso are fraudulent and void as against a subsequent incumbrance of *A.*'s life estate.

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husband and wife, and the issue of the marriage. By the same deed *Charles Morley Balders* demised the premises, of which he was tenant for life, to the trustees for a term of ninety-nine years, in order to secure the payment of 300*l.* a year as pin-money to *Mary Hare*, to her separate use during the joint lives of himself and her; and he limited a jointure to her in the event of her surviving him.

The same parties, on the same day, executed another indenture, by which, (after reciting, that, inasmuch as doubts might be entertained with respect to the sufficiency of the term of 500 years as a security for the 3000*l.*, provision should be made, out of the surplus rents and profits of the premises, after payment of the 300*l.* a year to *Mary Hare*, for the eventual deficiency of that security by an extension of the trusts of the term of ninety-nine years, and that it was agreed that *Charles Morley Balders* should enter into engagements restraining himself from alienating, charging, or encumbering his life estate or interest in the premises,) he, *Charles Morley Balders*, for himself, his heirs, &c. did covenant with *Richard Viscount Bantry*, *Richard Hare*, *William Henry Hare*, and *John Jones* (the trustees), their executors, administrators, and assigns, "that, in case the marriage should take effect, he should not nor would at any time during his life sell, mortgage, charge, or in any manner encumber the manor and premises in the indenture of even date therewith granted and demised, with any sum or sums of money, either annual or in gross, or in any other manner whatsoever; and it was thereby agreed and declared between the parties, that, if he, *Charles Morley Balders*, should at any time sell, mortgage, charge, or in anywise encumber the said manors and premises, or any of them, or attempt so to do, or execute, or attempt to do or execute any act, whereby the same should

should be vested in any other person, then and in such case the trustees for the time being of the term of ninety-nine years should receive the rents, issues, and profits of the hereditaments and premises comprised in the term of ninety-nine years, and after satisfying the annual sum of 300*l.*, being the pin-money of *Mary Hare*, should pay and apply the same rents, issues, and profits in such manner as they should think proper for the maintenance and support of *Charles Morley Balders*, or his wife, or children, or issue; and further, that, in case the security intended to be made of the residue of the term of 500 years should, in the opinion of the trustees or trustee for the time being, prove defective and inadequate for all or any part of such portion of the sum of 3000*l.*, if any, as should be lent thereon, whereby the loss of any part thereof should be sustained, or should be apprehended by the trustees or trustee, then that the trustees, or the survivor of them, &c. might receive all the rents, issues, and profits of the said premises, over and above the 300*l.* a year directed to be paid to *Mary Hare*, and should pay and apply such yearly sum as to them the trustees should seem proper, not exceeding in the whole one third part of such surplus of the clear yearly rents, issues, and profits of the said premises, unto and for the personal maintenance and support of *C. M. Balders*, and his wife and family, as the trustees should in their or his discretion think proper; and upon further trust from time to time to lay out and invest the ultimate residue or surplus of such yearly rents, issues, and profits of the premises, other than such parts thereof as should be necessary for effecting and keeping on foot a certain insurance on the life of *Charles Morley Balders*, in the public stocks or funds, or on real or government securities, at interest in the names of the trustees; and, in like manner, from time to time to lay out and invest

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the dividends, interest, and annual produce of such money, stocks, funds, and securities in their names, in order to accumulate in the nature of compound interest, until the monies, so to be from time to time invested, should amount to a sum equal to that which should have been originally advanced upon the security of the term of 500 years, or so much thereof as should not be actually received by virtue of that security." The indenture contained also a declaration, that the trustees, and the survivor of them, his executors and administrators, should stand possessed of and interested in such accumulated fund, and the dividends, interest, and annual produce thereof, from the time such accumulations should cease, as a security for the sum of 2000*l*. and the interest thereof, and subject thereto, in trust for *Charles Morley Balders*, his executors, administrators, and assigns.

The marriage was solemnized; and several children were the fruit of it.

In February and June 1810, *Charles Morley Balders* granted, for valuable consideration, to the *Albion Insurance Company*, two redeemable annuities — the one, of 485*l*. — the other, of 258*l*. — charged on the lands, of which he was tenant for life under his father's will; and, to secure the payment of the annuities, he demised the lands to a trustee for ninety-nine years. The annuities having fallen into arrear to the amount of more than 2000*l*., the *Albion Insurance Company*, by their secretary and trustees, filed, in 1814, a bill, praying that the indenture of settlement and the deed of covenant, dated respectively the 15th of January 1803, might, so far as respected the interest reserved to *Balders*, be declared fraudulent and void.

Pending

1. Pending the suit, *Balders* died.
By the decree, made at the original hearing, the Vice-Chancellor directed the Master to inquire what sums of money the trustees of Mr. *Balders's* settlement had received since the filing of the bill, in respect of rents and profits of the premises accrued due before that gentleman's death, and how those sums of money had been applied.

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By the Master's report it appeared, that considerable sums, out of the rents and profits of the premises, had been applied by the trustees to the education and maintenance of the children of *Charles Morley Balders*, and in making payments for his personal benefit.

By the decree made by the Vice-Chancellor on further directions, it was declared, "that the trustees were not entitled to be allowed, out of the monies received by them, any sums of money paid or allowed by them, which were for the personal benefit of *Charles Morley Balders*, or for the maintenance and education of his children." And it was ordered, "that the Master should ascertain, whether any, and which of the sums mentioned in the schedules to his report as paid or allowed by the trustees, were to be considered as paid or allowed for the personal benefit of *Charles Morley Balders*, and that the Master should disallow the same, and also the sums alleged to have been paid for the maintenance and education of the children."

The trustees and the children appealed against so much of the decree as contained this declaration, and the directions founded upon it.

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The question was, Whether the second deed of the 15th of January 1803 was valid as against an incumbrancer, so far as it provided that, if *Balders* sold or incumbered his life interest, it should be lawful for the trustees of the term, created by the first deed of the same date, to apply the rents and profits, after paying *Mrs. Balders's* pin-money, to the maintenance and support of *Mr. Balders*, or his wife or children, in such manner as they should think proper.

Mr. Sugden and *Mr. Wilbraham*, for the appellants.

The decree of the Vice-Chancellor introduces into our law an entirely new doctrine, which is not sanctioned by any authority. It proceeds upon the notion, that, if property be given to a man for life, a proviso cannot be annexed, which, upon a certain event, shall defeat his estate, and limit the property to other persons during his life. Several cases have decided that the law is not so, *Campion v. Cotton* (a), *Dommett v. Bedford* (b), *Roe v. Galliers*. (c) In the present case, the proviso is, that, if the tenant for life shall do certain acts, the right to take and apply the rents and profits shall belong to the trustees of the term; and this proviso is a part of what was purchased from *Mr. Balders* for the consideration of marriage, and of the large sum of money which *Lord Ennismore* paid as a portion with his daughter. The question here is, not between a purchaser and creditor, but between two purchasers of the same subject; and of these, he, who has priority in time, must prevail, unless the whole of this trust is to be cut down as vitious.

Even if the proviso could not be sustained, so far as the trust, which it raises, might be for the benefit of *Balders*

(a) 17 Ves. 263.

(b) 6 T. R. 684.

(c) 2 T. R. 133.

Balders himself, on what ground can it be impeached, so far as it stipulates for a benefit to his wife and children? If the covenant had been merely, that, in the event of alienation by *Balders*, the trustees should apply the rents to the maintenance of his wife and children, or accumulate them as a further provision for those individuals, it must unquestionably have been sustained. What difference does it make, that a discretionary power is given to the trustees, to exercise their trust in favour of *Balders* himself? If such a trust in his favour be void, if he is not capable of taking the benefit of it, the only consequence is, that the trustees are bound to exercise the trust in favour of such of the objects of it as are capable. *Alexander v. Alexander* (a), *Routledge v. Dorril*. (b)

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v.
Lord
Rousell.

The circumstance of the covenant being contained in a distinct deed from that which secures the pin-money to the wife and creates the term of ninety-nine years, is no ground of objection. It matters not whether the stipulations, which constitute the marriage settlement, be embodied in one instrument or in two instruments. If the covenant would have been valid, supposing it to have been inserted in the deed which secures the wife's pin money, it must be equally valid in its present form. There was no intention of fraud in the parties; there could be no such intention; and if blame is to be imputed any where, it must fall upon the insurance company, who chose to advance their money without making any application to the trustees of the settlement, or using any diligence to discover the nature of *Balders's* interest in the property.

Mr. Heald, Mr. Bickersteth, and Mr. Daniel, *contra*.

It is not necessary for the Plaintiffs to assert or prove, that

(a) 2 Ves. sen. 640.

(b) 2 Ves. jun. 357.

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that the parties to the deed of covenant actually intended to commit a fraud. The ground, on which we rest our case, is, that such machinery, as has been employed here, is contrary to the policy of the law; and, being in its very nature calculated to effect fraud, must, in a court of justice, be deemed fraudulent and void. Here is a settlement made of Mr. *Balders's* own property, (had the settlement been of the fortune of the wife, or had it been made by a third person, the question might have been different), by which his life interest is to cease only in the event of his alienating or incumbering that interest, and the rents and profits are thereupon to be received by other persons, and are to be applied for his own benefit directly, or for the benefit of his wife and children, and, through their medium, of himself too. Such a disposition must be void, on the principles of law and policy, which produced the decisions in *Ex parte Murphy* (a); in *re Meagher* (b); *Ex parte Cooke* (c); and *Higginbotham v. Holme* (d); and though these were cases turning on the bankruptcy of the settlor, the decisions proceeded, not on any particular provisions of the bankrupt acts, but on general legal doctrines. Can a man be allowed to covenant, that, if he sells his estate, the purchaser shall not have it, but it shall go to a trustee, who is to apply the rents for the benefit of the vendor and his family? The purchaser of the specific property has, in such a case, even a stronger claim to the interference of courts of justice in his behalf than the general body of creditors, when an attempt is made to defeat the interest of the settlor in the event of his bankruptcy. This covenant is fraudulent within the 27th *Eliz. c. 4. s. 5.*; it is tantamount to a reservation of a power of revocation of the existing estate in the event of his alienating or incumbering that estate.

(a) 1 *Sch. & Lef.* 44.

(b) 1 *Sch. & Lef.* 179.

(c) 8 *Ves.* 355.

(d) 19 *Ves.* 88.

*Land. - Lovender v. Blackstone (a), - Tarback v. Man-
bury. (b)*

1897.

Baron

Lord

Sumner

The covenant would have been void, even if it had been inserted in the deed creating the term; but the circumstance of its being made the subject of a separate instrument stamps the character of fraud more unequivocally on the transaction. *Balders* is enabled to produce what appeared to be a complete marriage settlement, making a reasonable provision for his wife out of his life estate and by the exercise of his power of jointure. Nothing is to be found in that deed which could suggest to any person the probability of the existence of a farther charge on the husband's life estate, created in consideration of the marriage and the wife's portion: it seems to contain all the stipulations and advantages which the wife and her relations had bargained for: and the benefits thereby secured to her and her children, would naturally be presumed to be all that was purchased by the marriage and the payment of her portion. The most prudent and wary purchaser, dealing with *Balders*, could not look further. Can parties, who have thus dealt with each other, be permitted to execute another instrument, the existence of which no man can discover or suspect, and thereby defeat the estate which, by the former deed, *Balders* had full power to alienate or incumber, and defeat it only against the *bonâ fide* purchaser? If such a transaction stands, no purchaser can be safe.

1897.
1898.

Mr. Sugden, in reply.

This covenant has no analogy to a power of revocation. Even if it were considered as a power, yet it would be a power

(a) 9 *Lee* 148, (b) 2 *Vern* 510.

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 v.
 Lord
 BATHURST.

a power reserved, not to the settlor, but to the trustees; or, at least, it is a power not to be exercised without their consent. The cases in bankruptcy have no application to the question; both because the decisions in bankruptcy proceed on particular principles, and, also, because here the contest of the prior purchaser is not with assignees, and a general body of creditors claiming under the operation of law, but with subsequent purchasers, whose only title is under the deed of the same party under whom he claims. The two deeds of the 15th of January 1808, formed together a reasonable settlement; and this Court cannot strike out any of the stipulations which the wife and her father purchased for the benefit of herself and her children, and for which they paid, not merely a sum of money, but the highest consideration known to the law.

1829.
 Feb. 4.

The LORD CHANCELLOR.

The question in this cause is, Whether, in a transaction of such a kind as appears in these pleadings, *Balders* could charge this property with the payment of the annuities granted to the *Albion* Insurance Company; or, is the provision in the second deed to have effect, so as to defeat the securities given for the payment of the annuities.

The case was argued as to two points. It was said, first, that the provision, enabling the trustees to apply the rents and profits to the maintenance of *Balders* himself, was sustainable; and, secondly, that, assuming that the provision, enabling the trustees to apply the rents and profits for the maintenance of *Balders* himself, could not be sustained as against the incumbrancer, yet the Court would sustain it so far as regards the application of those rents and profits to the maintenance of the wife and children

dren of Mr. *Balders*. The first point was not much pressed, and seems to me free from all reasonable doubt. The transaction, in that respect, cannot be sustained. *Balders* has a life-interest in certain property; having that life-interest, can it be contended, that he can enter into a covenant—a private deed—with his own trustees, that he shall not incumber his interest in the property, and that, if he does incumber it—if, for instance, he sells it for valuable consideration,—the effect is to be, that the purchaser shall not be entitled to possess what he has bought, but that *Balders* himself, subject to the discretion of his trustees, and under their direction, shall continue to enjoy the rents and profits, as if the alienation had not taken place? In point of law, such a transaction cannot be sustained.

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 v.
 Lord
 ENNEMORE.

The only question, which admits of doubt, is, Whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands, that the parties to the deed did not contemplate a fraud; but the transaction is, in its very nature, fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation. In point of law, the deed cannot be sustained. I concur, therefore, with the judgment of the Vice-Chancellor.

The question was before Lord *Eldon* on a motion; and, though he did not express a decisive opinion, I collect, that he concurred in the view which I have taken of the case.

Appeal dismissed.

1887]

Nov. 10, 11.

Nov. 10, 11.

21. 28.

Dec. 11.

B., the holder of certain bills accepted by *F.*, attaches, by proceedings in the Lord Mayor's Court, in the hands of *C.* a large sum of money belonging to *F.*; *F.* having filed a bill to restrain the action, a special injunction is granted, and the money is paid into Court by the garnishee; *B.* by his answer denies the whole of the equity suggested by the bill: Held, that, though the injunction must be dissolved, the money in Court will not be paid out to *B.*, before he has obtained judgment in his action.

A party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances.

How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by the consent of counsel in Court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either.

FURNIVAL v. BOGLE and Others.

ACCORDING to the allegations of the bill, the Defendant, *Robertson*, having pledged two thousand shares in "The British Rock and Patent Salt Company" for 12,000*l.*, applied to the Plaintiff to lend him his acceptances to the amount of 12,700*l.*; stating, at the same time, that he had friends in *Scotland*, who, upon the Plaintiff's acceptances, and a deposit of the shares, would advance 12,000*l.*, the sum necessary for redeeming them, provided the shares were also made a security to them for an old debt of 3000*l.* The Plaintiff agreed to accept the bills, on condition that the proceeds of the two thousand shares should be chargeable first with the payment of the advance of 12,000*l.*, for which the Plaintiff's acceptances were to be a collateral security, and should not be applied in satisfaction of the debt of 3000*l.*, till after this advance of 12,000*l.* was repaid. The friends in *Scotland*, who were to advance the 12,000*l.*, were the Defendants *H.* and *A. Bogle*.

The bill stated, that, in pursuance of this arrangement, the Plaintiff accepted the bills for 12,700*l.*, and handed them over to the agent of Messrs. *Bogle*, upon

a written undertaking of the agent not to part with the proceeds of the bills, till the Plaintiff had approved of the deed which was to be executed by *Robertson* and the Messrs. *Bogle*; that, in violation of this undertaking, the agent transmitted the acceptances to Messrs. *Bogle*; that a deed was executed by them and *Robertson*, without the Plaintiff's knowledge or consent, by which the shares, instead of being made a security, according to the alleged agreement with the Plaintiff, first for the 12,000*l.* collateral secured by his acceptances, and subject thereto, for the old debt of 5000*l.*, were made a security in the first instance for this old debt of 5000*l.*, and after satisfaction of that debt, for the due payment of the acceptances: that *Robertson* had not taken up the bills; that the Plaintiff, having 26,000*l.* in the hands of two others of the Defendants in the city of *London*, the Messrs. *Bogle* had attached it by means of proceedings in the lord mayor's court; that the two thousand shares were worth considerably less than 15,000*l.*, though worth more than 9000*l.*; and that the object and intention of the Messrs. *Bogle* was to make the shares available, in the first instance, for payment of their old debt of 5000*l.*, instead of applying them, first, according to the original agreement, in payment of the Plaintiff's acceptances.

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FOUNTAIN
of
BOOK

The prayer was, that the Defendants, the Messrs. *Bogle*, might be restrained from prosecuting the attachment, or bringing or carrying on any action or proceedings in the mayor's court, or in any other court, against the Plaintiff or the garnishees, upon or in respect of his acceptances, and from negotiating them; that it might be declared; that the Plaintiff was entitled to have the two thousand shares applied in payment of the bills, and towards his indemnity, and that he was not liable to pay more in respect of the bills, than so much of the amount due thereon as the proceeds of the

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two thousand shares might fall short of satisfying; that the Defendant *Robertson* might be compelled to indemnify the Plaintiff against the bills and all the consequences thereof, and particularly against the proceedings in the mayor's court; that the garnishees might be restrained from paying the 26,000*l.*, or any part of it, to the *Bogles*, or otherwise than to the Plaintiff; and that it might be declared, that the Plaintiff was not liable to pay the 3000*l.*, or any part thereof, and that the same was not a charge upon the two thousand shares, otherwise than secondarily, after the acceptances were paid: the Plaintiff offering, as between him and the *Bogles*, to pay so much of the amount due upon the bills of exchange, as the two thousand shares might not be sufficient to satisfy.

An injunction was obtained to stay the proceedings in the mayor's court, and 13,000*l.* was paid into the Court of Chancery by the garnishees.

The Defendants, the *Bogles*, having put in their answer, by which they denied the equity stated in the bill, gave notice of motion, that the 13,000*l.* might be paid out of court to them, or that the injunction might be dissolved.

On *Saturday* the 3d of *November*, Mr. *Sugden*, on beginning to open this motion on behalf of the *Bogles*, proposed, that an order should be made by consent, on terms which he stated. The most material of the terms were, that the money in court should be paid to the Messrs. *Bogle*, and that the shares should not be brought immediately into the market. Mr. *Heald*, the leading counsel for the Plaintiff, expressed his opinion, that the offer was fair and reasonable; but, as Mr. *K.*, the solicitor who instructed him, was not in

in Court, he requested time to consider whether he should accede to it or not. Mr. *Sugden* declined to grant any postponement; stating, that if his offer were not accepted, he must forthwith proceed adversely. The counsel for the Plaintiff then acceded to the offer; and the order was made, by consent, on the proposed terms, in the presence of Mr. *K.*'s clerk.

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BOGLE.

On Tuesday the 6th of November, the Plaintiff discharged Mr. *K.* from being his solicitor; and immediately gave notice of motion, that the order by consent might not be drawn up, and that the Messrs. *Bogle* might be at liberty to proceed upon their original notice of motion as they should be advised.

Mr. *Heald*, Mr. *Knight*, and Mr. *Botch*, in support of the application, stated, that the arrangement had been entered into under the notion that Mr. *Furnival* deemed it to be for his advantage that the sale of the shares should not be pressed; whereas it turned out that he would much rather that the shares should be sold forthwith, than that the proposed order should stand. The Court would not bind him by an order which his counsel had acceded to, without communication with him, and in the absence of his solicitor, and without instructions either from him or his solicitor, and which he had repudiated as soon as it came to his knowledge.

Nov. 10.

Mr. *Sugden*, *contra*,

Cited *Mole v. Smith* (a), where Lord *Eldon* said, that it was for counsel to consider whether they were authorized to consent, and that, if they did consent, the party would be bound.

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(a) 1 Jac. & W. 675.

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The LORD CHANCELLOR.

I must consider the case as if Mr. *Furnival's* solicitor, Mr. *K.*, had been in court, and assented to the order. His clerk was in court, when Mr. *Sugden* made the proposition; some communication took place between Mr. *Heald* and him. He did not object to the arrangement, and I must presume that he immediately communicated what had occurred to his principal *K.* It was the duty of the solicitor, if he dissented from the order, to have given immediate notice of his objection. *Saturday* and *Monday* elapsed: on *Tuesday* morning a new solicitor is appointed, and then, for the first time, an objection is made to the order. If Mr. *K.* had been in court, and had assented to the arrangement, it would have bound his client. He has adopted it; for it was communicated to him, and he did not object to it. The client must, therefore, be bound.

If Mr. *Furnival* had not made an accurate statement of the facts to Mr. *K.*, it would perhaps have been too much to have bound him by the order; and he might have been let loose from it on proper terms. But there is nothing before me to shew, that *K.* was not accurately informed of the circumstances of the case.

It is said that there were material facts, which were not communicated to counsel. But that is a new suggestion. There is no evidence that the counsel were not in possession of all the facts necessary to be known, in order to enable them to exercise a sound discretion.

Nov. 14.

Mr. *Heald* applied to the Lord Chancellor to suspend the passing of the order, till Mr. *Furnival* could renew his motion on further affidavits, which, it was stated, would shew, that his counsel, when they consented to the order, had not the facts fully before them.

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An intimation having been given on the preceding day, to the solicitor of the Messrs. *Bogle*, that such an application would be made, Mr. *Sugden* appeared to oppose it.

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The LORD CHANCELLOR.

I think that, under all the circumstances of the case, an opportunity ought to be afforded to Mr. *Furnival*, of discussing the question, whether he is to be bound by the order which has been made. Mr. *Furnival* supposed that, on his application, stating that counsel were not authorized to consent to the order, the court would suffer the subject to be again gone into; and he therefore did not, on the former occasion, introduce all the circumstances, which, it now appears, he might have brought forward. If it had been then shewn, that counsel, when they exercised their discretion, had not those materials before them, on which a correct judgment might be formed, the decision of the court might have been different. It is stated that there is now evidence on affidavit, which establishes, or goes far to establish, that point. I therefore think myself bound to suspend the drawing up of the order, till the case can be considered in the new form in which Mr. *Furnival* wishes to present it to the court; and I do so with the less reluctance, because no inconvenience can arise to the other party from this short delay.

Mr. *Furnival* was ordered to pay the costs of the appearance of the Messrs. *Bogle* on this occasion, though no notice of motion had been given.

Mr. *Knight* and Mr. *Rotch* renewed the motion on behalf of the Plaintiff.

Nov. 21.

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BOGLE.

The circumstances, on which they relied, are stated in the judgment of the Lord Chancellor.

Mr. Sugden, *contra*,

Contended, that the circumstances alluded to, even if they could be considered material, were all known to the solicitor, and that, the solicitor having, with a full knowledge of the facts, acquiesced in the arrangement, Mr. *Furnival* was bound.

The LORD CHANCELLOR.

It now appears, that a proposition, similar to that which is embodied in the consent order, had been made to Mr. *Furnival* at an earlier stage of the business, and had been positively rejected by him; that it was afterwards renewed, but no answer was then given on his behalf; and that he long since instructed his solicitor to use his utmost exertions to prevent Messrs. *Bogle* from getting the money out of court. If Mr. *Furnival* had been in court, when Mr. *Sugden* made his proposition, I have no doubt that he would have prevented the arrangement from being acceded to; and if the circumstances, to which I have referred, had been communicated to his counsel, they would not have assented to the order: for it is quite impossible that they should have considered themselves justified in acceding, in the absence of Mr. *Furnival* and his solicitor, to the proposal of the Messrs. *Bogle*, had they been aware that a similar offer had been before made to him, and rejected; that, upon its being renewed, he returned no answer, which amounted to a second rejection; and that he had desired the utmost activity to be used, in order to prevent the money from being taken out of court. Mr. *Furnival*'s counsel, therefore, at the time when they assented to the arrangement, were not apprised of facts, the knowledge of which was essential in reference

ence to the question on which they were to exercise their discretion.

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There is another point on which I have more difficulty. If the solicitor had been present in court, and had known all those facts, the party would have been bound by his consent. Here the solicitor *K.* was not present; and the question is, whether *K.*'s subsequent conduct has fixed Mr. *Furnival* with an agreement, which, independently of *K.*'s conduct, would not be binding on the client.

Mr. *K.*, it appears, knew nothing of the arrangement, till after the rising of the court on *Saturday*, the 3d of *November*: he expected Mr. *Furnival* to arrive in *London* on *Monday* morning; but, on *Monday*, a letter was received from Mr. *Furnival*, stating that he would not arrive till the following day. Under these circumstances, the solicitor thought it better to wait till Mr. *Furnival* arrived in *London*, than to take any immediate step to stay the progress of an order, which, he knew, could not be drawn up before *Tuesday*. It would have been better, if Mr. *K.* had interposed immediately; but there has not been so much remissness on his part, as to make the arrangement binding on *Furnival*, who, as soon as he came to town, manifested the strongest dissatisfaction with the course which had been pursued, and appointed another gentleman his solicitor.

I think, therefore, that Mr. *Furnival* ought to be placed in the same situation, as if the arrangement had not been made. And I am the more disposed to come to this conclusion, because, though the Messrs. *Bogle* will lose the benefit of the order, they will not lose any advantage which the merits of their case entitle them to, or which they could have obtained, if Mr. *Furnival* had been present. Mr. *Furnival*, however, must pay the costs of

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the consent order and the proceedings to which it has given rise, including the costs of this application.

Nov. 28.

The motion that the money might be paid out of court to the *Bogles*, or that the injunction might be dissolved, was renewed.

Mr. *Sugden* and Mr. *Pemberton* for the motion.

The equity stated in the bill is so fully and explicitly denied by the answer, that the counsel for the Plaintiff admit that the injunction must be dissolved. But that is not enough; we are entitled to have the money in court paid to us forthwith. The special injunction, by putting an utter stop to our proceedings at law, has delayed us for several months; had we not been restrained, we should long ere this time have had judgment and execution; and it is now clear that the injunction ought never to have issued. Great injustice, therefore, will be done, if that money, which is unquestionably ours, be withheld from us for a moment longer. If the Court had not interfered, that money would have passed from the garnishee into our pockets; the garnishee has placed it in the hands of the Court; and the Court ought now to pay it over to those from whom it has been wrongfully detained. Our legal right is not denied in the bill; on the contrary, the Plaintiff says, that, unless equity interferes, we shall recover at law; he does not affect to have any legal defence to the action; if any such defence existed, that ought to have been suggested in the bill. In a case not reported, *Lubbock v. Gordon* (a), upon the dissolution of an injunction, money, which had been brought into court by the plaintiff, was ordered to be paid to the defendant.

Mr.

(a) Mentioned by Mr. *Pemberton*, *ex relatione* Mr. *Norton*.

Mr. *Bickersteth*, Mr. *Rotch*, and Mr. *Swann*, for the Plaintiff.

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BOGLE.

The Defendants have denied by their answer the equity alleged by the bill, and the injunction must therefore be dissolved. But the answer of these Defendants may be disproved in the cause, and, at the hearing, a good equity may be established by evidence. The Court cannot assume that the Plaintiff will not ultimately prevail against the *Bogles*; the money is *prima facie* the money of the Plaintiff, and, as such, has been paid in by his debtor; and it cannot be parted with to any person but him, until the cause is finally disposed of.

There is no pretext for the claim, now made by the *Bogles*, to have the money in court paid over to them in the present stage of the proceedings. They admit by their answer that the bills were accepted by the Plaintiff for *Robertson's* accommodation, and that they were aware of that fact, when the acceptances came into their hands. The Plaintiff, therefore, stands in the situation of a mere surety for *Robertson*, who may be liable to pay the Defendants what they have advanced upon these bills, but can be liable for nothing more. Then what is their claim to this 13,000*l.*, which is indisputably the money of *Furnival*? Their only possible claim is, that it ought to be paid out of court to them in satisfaction of their advances to *Robertson* on these bills. Conceding, for the purposes of the present argument, that the Plaintiff is liable to the extent of those advances, what evidence is there before the Court, which can enable it to declare, that the Defendants have, in fact, advanced one farthing on the bills? It may be sworn in the Defendants' answer and in their affidavits; and what is so sworn is evidence for the purpose of continuing or dissolving the injunction against the proceeding

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ceeding at law, by which the question, whether any and what advances have been made on the bills, will be determined: but it is not evidence for the purpose of finally determining the fact that any advances have been made, or for ascertaining the amount of those advances, so as to entitle the Plaintiff to immediate payment.

In the MS. case cited, where the money was paid out of court to the defendant, the injunction was after verdict; so that there the question of debt, and its amount, had actually been determined. (a) Here the whole question between the parties is open and undecided. The Plaintiff may have, and he insists that he has, a defence at law to the action in the lord mayor's court. It was not his duty, nor would it have been prudent, to have set forth that defence in his bill: his equitable case was all which it was necessary or fit to put on the record in this court. There is no rule of equity which says, that a plaintiff, in coming here to enforce any equity which he may have, shall purchase the interference of the Court of Chancery by the sacrifice of his *legal* rights. (b) He comes into this Court to say, not that he has no defence at law, but that there are circumstances in his case which ought to protect him from being questioned at law. A party, having a defence at law, and also a defence in equity, may seek to protect himself by the latter, without abandoning the former.

Mr. *Treslove*, for the garnishee.

Mr. *Sugden*, in reply.

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(a) See *Wynne v. Jackson*, 2 *Russell*, 351.

(b) See *Cockerell v. Cholmeley*, 3 *Russell*, 578.

The LORD CHANCELLOR.

1827.

It is clear that the injunction must be dissolved, and with costs. The question that remains is, whether the money, which was paid into court by the garnishee, ought to be paid out to the Defendants, the *Bogles*.

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v.
BOGLE.

Dec. 11.

It was contended, on the part of *Furnival*, that the money ought to remain in court till the hearing of the cause; but it is impossible to support that position. The effect of it would be, to render the dissolution of the injunction nugatory; for, as the garnishee could not be charged twice, the *Bogles* would be unable, while the money remained here, to obtain, by their proceedings at law, the fruit of those proceedings.

On the other hand, it was contended, that the money ought now to be paid out to Messrs. *Bogle*. But it seems to me equally impossible to maintain that position; and for this reason, that there is no judgment at law ascertaining their legal right or the amount of their legal demand. If this court were to order the money to be paid to them, it would in effect give judgment on the proceedings at law. It is impossible for this court to anticipate what the judgment in the mayor's court will be, particularly with respect to the amount of the sum which may be recovered.

The proper order will be, to dissolve the injunction; to restrain the garnishee from setting up the payment of money into this court as a defence to the action in the mayor's court; and to direct the parties, as soon as judgment is obtained on the action, to apply in the cause.

Mr. *Sugden* objected to any order which would have the effect of preventing his clients from issuing out execution

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execution against the garnishee, as soon as they had obtained judgment.

The LORD CHANCELLOR,

If the *Bogles* wish to be at liberty to proceed to execution, the garnishee must be allowed to take the money out of Court.

Nov. 20, 21,
 22.

PEMBERTON v. OAKES.

A., B., and C.,
 carrying on
 business in
 copartnership
 for a term,
 which would
 expire on the
 19th of *Fe-*
bruary 1807,
 under articles
 which empow-
 ered *A.*, in case
 of his death

WILLIAM HARDING, Charles Oakes, and Thomas
Willington, carried on the business of bankers at
Tamworth, under the firm of *Harding, Oakes, and*
Willington. The co-partnership subsisted under arti-
 cles of agreement dated the 5th of *January* 1792, which
 stipulated, that it should continue for fifteen years from
 the 18th of *February* then next, and that *Harding*
 should
 during the term, to bequeath his share of the trade in favour of his wife or children,—
S., a customer of the bank, and a surety, covenanted that they, or one of them, would
 pay to *A., B., and C.*, the survivors or survivor of them, &c. all sums, which, on,
 before, or until the 19th of *February* 1807, should become due from the customer
 to *A., B., and C.*, the survivors or survivor of them, &c.: *A.* died, having bequeathed
 his share of the concern to his executors, in trust for his children: the business con-
 tinued to be carried on under the same firm as before; and his executors interfered
 in the management, and shared in the profits. At the time of *A.*'s death, the balance
 due from *S.* to the bank was upwards of 14,000*l.*; after that time *S.* continued his
 dealings with the bank in the same manner as previously, paying in more than
 14,000*l.* within a few weeks after *A.*'s death, but drawing out, during the same
 period, a larger sum; and these subsequent dealings were contained in the same
 account current with the preceding dealings: some years afterwards, *S.* became insol-
 vent, being indebted to the bank in a balance of 19,000*l.* and upwards: Held,

That the partnership, which carried on the business after the death of *A.*, was a
 new partnership;

That the surety's covenant did not extend to cover sums advanced to the cus-
 tomer by the bank after *A.*'s death;

That the balance, due at *A.*'s death from the customer, was to be considered as
 discharged by the payments subsequently made by him to the bank.

should have one half of the profits for his share. If either *Oakes* or *Willington* should die during the partnership, the survivors were to continue the concern during the term; and the executors and administrators of the party dying were to be paid the deceased's share of the capital and profits of the bank up to the time of his death. But if *Harding* should die during the co-partnership, he was to have the power of disposing of his share of the business by his will or by any other writing under his hand, to or in favour of his wife and children or such one or more of them as he should think proper: and there was a proviso, that, in case, at the time of *Harding's* death, the person or persons, in whose favour he should make such disposition, should be a minor or minors, *Harding* should appoint some competent person or persons to assist *Oakes* and *Willington* and the survivor of them to conduct and carry on the business, during the minority or minorities of such appointee or appointees, in the same manner as if *Harding* were living. The articles further provided, that the person or persons, in whose favour such disposition should be made, should, immediately upon the decease of *Harding*, during the co-partnership, or as soon after as such person or persons should have attained respectively the age of twenty-one years, become bound to *Oakes* and *Willington*, or to the survivor of them (if required so to do), in one or more bond or bonds in the penal sum of 10,000*l.*, to be conditioned for the due observance and faithful performance, on the part of the obligor or obligors, of all the covenants, conditions, and agreements therein contained: that, in such case, the person or persons, in whose favour such disposition should be made, should have and be entitled to the same share or interest in the concern as *Harding*, if he had been living, would have been entitled to; and that the business should be thence-

forth

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forth carried on by the surviving partner or partners and such appointee or appointees, in the same manner in which, and subject to the same terms and conditions under which, it would have been liable to have been continued and carried on by virtue of the articles, in case *Harding's* death had not happened.

William Harding died on the 26th of *March* 1802. His will, dated the 13th of *July* 1799, contained a clause, which, after referring to the co-partnership business and the power which the articles gave him to dispose of his share of it, proceeded in the following words: — “ I do hereby give, bequeath, and dispose of all my share and interest in the said co-partnership business and in the future profits and produce thereof, to accrue after my decease, to *Martha Harding, Thomas Paget, Joseph Paget, and Thomas Bankart*, their executors, administrators, and assigns, in trust for, and for the only proper benefit and advantage of, all and every such of my children as shall survive me, to take and enjoy the same as tenants in common, and to be equally divided between and amongst them accordingly. If any one or more of my said children, who shall survive me, shall die during his, her, or their minority or minorities, then the share or shares of him, her, or them so dying shall go to the survivors or survivor of them; if more than one, to be divided equally between or amongst them, share and share alike. And I do hereby nominate and appoint, authorize and empower, the said *Martha Harding, Thomas Paget, Joseph Paget, and Thomas Bankart*, and the survivors and survivor of them, to carry on, manage, and conduct the said co-partnership business in my stead, jointly with *Charles Oakes* and *Thomas Willington* and the survivor of them, during the continuance of such partnership, in trust, nevertheless, for, and for the only benefit

benefit and advantage of, such of my said children as shall survive me, and the survivors and survivor of them in manner aforesaid: provided always, that nothing in the last-mentioned clause shall extend or be construed so as to give or dispose of my share or interest in the ready money, credits, or any other effects belonging to the said partnership; but the same shall be considered as part of the residue of my personal estate hereinbefore bequeathed to my said trustees upon the trusts hereby declared concerning the same."

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The executors and executrix proved the will. The bank continued, down to the year 1807, to be carried on under the same firm, in the same place, and in the same manner, as during Mr. *Harding's* life. Mrs. *Harding* took an active part in the management of the concern: she signed accounts relating to it; and the personal representatives of Mr. *Harding* participated in the profits of the business.

Benjamin Stokes, a merchant, carrying on business at *Birmingham*, was a customer of the firm of *Harding, Oakes, and Willington*, and kept a banking account with them. The balance against him in their books having been gradually increasing, they, in *January* 1802, applied to him for some security; and, accordingly, by indenture dated the 4th of *January* 1802, made between and executed by *Benjamin Stokes, Samuel Pemberton, and George Stokes* of the one part, and *William Harding, Charles Oakes, and Thomas Willington* of the other part, — (reciting, that *Benjamin Stokes* had for some time kept a banking account with *William Harding, Charles Oakes, and Thomas Willington*; that a considerable sum of money was then due from him to these bankers; and that, in order to secure to them as well the money then due from him as also the sums which

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which should thereafter, before the 19th of *February* 1807, become due from him to them, as far as the amount of 20,000*l.*, *Samuel Pemberton* and *George Stokes* had agreed to join with *Benjamin Stokes* in the indenture) — it was witnessed, that *Benjamin Stokes*, *Samuel Pemberton*, and *George Stokes*, did thereby, for themselves jointly and severally, and for their respective heirs, executors, and administrators, covenant, promise, and agree to and with *William Harding*, *Charles Oakes*, and *Thomas Willington*, their executors, administrators, and assigns, that they, *Benjamin Stokes*, *Samuel Pemberton*, and *George Stokes*, or some or one of them, their, some, or one of their heirs, executors, or administrators, would pay to *William Harding*, *Charles Oakes*, and *Thomas Willington*, or to the survivors or survivor of them, or to the executors, administrators, or assigns of such survivor, upon demand, all sums of money, not exceeding 20,000*l.* in the whole, which then were or should at any time thereafter, before and until the 19th of *February* 1807, become due and owing from *Benjamin Stokes* to *William Harding*, *Charles Oakes*, and *Thomas Willington*, or to the survivors or survivor of them, or to the executors or administrators of such survivor, either for principal money then already lent and advanced, or thereafter within the time aforesaid to be lent and advanced, or for interest then due or to become due thereon, or for money then already paid or lent, or thereafter within the time aforesaid to be paid or lent by *William Harding*, *Charles Oakes*, and *Thomas Willington*, or the survivors or survivor of them, or the executors or administrators of such survivor, to *Benjamin Stokes*, or to his order, or for his use, or upon the credit of any promissory note, bill of exchange, draft, or note of hand, signed or indorsed by him, or upon any other account.

After

After the execution of this indenture, *Benjamin Stokes* continued to keep an account, and to have pecuniary dealings with the bank in the same manner as previously. These dealings consisted partly in sending to and depositing with *Harding, Oakes, and Willington*, as his bankers, bills of exchange, drafts or notes, drawn and accepted by various persons, as well as bills drawn by himself upon and accepted by other persons, according to the usual course of banking transactions; and in his receiving, in return, from *Harding, Oakes, and Willington*, cash, bank notes, and bills drawn by them upon and payable by their agents in *London*. The bank made up the accounts of the dealings between them and *Stokes* quarterly, and transmitted them regularly to him, according to the practice of bankers resident at a distance from their customers. In these accounts *Stokes* was charged with interest, commission, and various disbursements made by the bank for his use.

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At the time of *Harding's* death, the balance due from *Benjamin Stokes* to the bank was found by the Master to be 14,446*l*. After that event, *Benjamin Stokes* continued his dealings with the bank in the same manner as before, making payments to them and drawing large sums from them, but the balance upon the whole being always considerably against him, and generally on the increase. The payments, which he made between the 26th of *March* and the 30th of *April* 1802, amounted to more than was sufficient to pay off the balance due from him on the former date; but the sums drawn out by him, during this period, exceeded the sums so paid in. At the end of the quarter, in which *Harding's* death took place, the quarterly account was delivered in the usual manner: the balance due upon it was carried forward to *Stokes's* debit in the next quarterly account: the transactions

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transactions between him and the bank went on in the customary train; and the accounts were kept and entitled in the same manner in which they had been previously. This course of dealing continued till *February* 1806, when *Stokes* stopped payment. At that time the bank claimed, as due to them from him, upwards of 19,180*l.*; and they applied to *George Stokes* and the executors of *Samuel Pemberton* to give them security for that sum. In consequence of this application, *George Stokes* and the representatives of *Samuel Pemberton*, on the 27th of *February* 1806, executed a bond to *Oakes* and *Willington*, conditioned for the payment of this specific balance. On the bond was endorsed the following memorandum:—
 “The within-written bond is given to the within-named *Charles Oakes* and *Thomas Willington* as a collateral security for the within-mentioned sum of 19,180*l.* 1*s.* 4*d.* due to them from the within-named *Benjamin Stokes*, on a balance of a banking account between the said *Charles Oakes* and *Thomas Willington*, and *Benjamin Stokes*, and for which balance the said *Charles Oakes* and *Thomas Willington* hold another security under the hands and seals of the said *Benjamin Stokes*, and of the within-named *Samuel Pemberton* and *George Stokes*, bearing date the 4th of *January* 1802.

“THOMAS WILLINGTON
 For self and the said CHARLES OAKES.”

An action being brought on this bond, the obligors filed their bill for an injunction; insisting that, by virtue of the indorsement, the bond was in equity a security only for the sum, which *George Stokes* and *Samuel Pemberton* were liable to pay under the indenture of the 4th of *January* 1802, and that, upon the true construction of the instrument, as applied to the changes which had taken place in the constituent members of the banking firm, and the state of the accounts between
 the

the bank and *Benjamin Stokes*, nothing was due under the deed of guarantee.

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The Defendants, having filed their answers, moved, on the 17th of *July* 1809, to dissolve the injunction which had been obtained for want of answer. Upon that motion the Lord Chancellor ordered, that, upon the payment by the Plaintiffs of 12,500*l.** into court, the injunction should be continued until further order; and that it should be referred to the Master to inquire, whether, under the indenture of the 4th of *January* 1802, any and what sum of money was due to *Oakes* and *Willington* at the time of making the memorandum on the bond.

The money was paid in, and the reference prosecuted.

On the 18th of *May* 1824, the Master made his report. He found that, from and immediately after the death of *William Harding*, the banking business or concern was to be considered as having been conducted and carried on by *Martha Harding*, *Charles Oakes*, and *Thomas Willington* as co-partners, until the year 1807; that, therefore, a new partnership was created after the death of *William Harding*, to which *George Stokes* and the personal representatives of *Samuel Pemberton* were not liable, under the indenture of the 4th of *January* 1802, in respect of any advances made by the banking concern to or on account of *Benjamin Stokes*, beyond or exclusive of the balance due from him at the time of *William Harding's* death, and interest thereon; that, from the 26th day of *March* 1802 to the 30th of *April* in the same year, various sums of money were received by the persons then conducting the banking concern, from or
on

* Upwards of 6000*l.* had been paid by the obligors to the obligees.

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on account of *Benjamin Stokes*, as forming part of the dealings and transactions between them during that period, which amounted in the whole to more than sufficient to satisfy the balance or sum of 14,446*l.* 14*s.* 6*d.* due from *Benjamin Stokes* at the time of *Harding's* death and all interest thereon; and that the sums so received ought to have been appropriated in satisfaction of that balance, in preference to the discharge of any debt which became due from *Benjamin Stokes* to the bank, arising out of the subsequent dealings and transactions between him and the banking concern. For these reasons he certified, that there was not any sum of money due to *Charles Oakes* and *Thomas Willington*, under or by virtue of the indenture of the 4th of *January* 1802, at the time of making the memorandum on the bond.

The Defendants excepted to the report; insisting, that, until 1807, no new partnership was created after *William Harding's* death; that the Master ought to have taken into consideration the whole of the dealings and transactions between *Stokes* and the banking concern, down to the 27th of *February* 1806, and to have ascertained what, on the balance of such dealings and transactions, was then due from him; or, in case the Master ought not to have taken into consideration the whole of such dealings and transactions, then that he ought to have taken into consideration no part thereof, but ought to have computed interest on the balance due from *Stokes* at the time of *Harding's* death.

The exceptions and a petition to confirm the Master's report having come on together, the Vice Chancellor ordered that they should stand over with liberty for the Defendants, the assignees of the estate of *Charles Oakes* and *Thomas Willington*, to bring such action on the covenant contained in the deed of the 4th day of
January

January 1802, as they might be advised. From this order, the Plaintiffs appealed.

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Mr. *Marryatt*, Mr. *Heald*, Mr. *Sugden*, Mr. *Pepys* and Mr. *Pemberton* for the Appellants, and in support of the report.

The guarantee only extends to such sum as should become owing from *Stokes* to *Harding*, *Oakes*, and *Willington*, or the survivor or survivors of them, or the personal representative of such survivor. Now the advances, made to *Stokes* after *Harding's* death, were made, not by *Oakes* and *Willington*, but by a partnership consisting of *Oakes*, *Willington*, and the executors of *Harding*. That those executors became partners by the effect of the will, and exercised the rights and enjoyed the benefits of partners, cannot be denied. Upon the death of *Harding*, therefore, a new partnership was formed; a partnership, which was not the less a new concern, because it derived its origin from a power reserved by the articles, under which the original partnership was formed. The consequence is, that the guarantee cannot extend to any of the sums which became due from *Stokes* to the bank after *Harding's* death.

It was competent to the bankers, upon *Harding's* death, to have struck a balance, and to have commenced a new account with *Stokes*, to which alone his subsequent payments, as well as the sums subsequently drawn out by him, would have been referable. They have not done so; the account is one entire account; and, therefore, according to the principle of *Clayton's case* (a), and *Bodenham v. Purchas* (b), the payments, made after *Harding's* death, must be applied to the extinction of the then existing items of debit, according to the priority of dates.

Thus,

(a) 1 *Mer.* 685.

(b) 2 *B. & A.* 39.

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Thus, the alleged debt, which was secured by the guarantee, is extinguished; and the debt contracted by the subsequent advances to *Stokes*, is not comprehended within the guarantee; so that nothing is due from the sureties to the bank. *Brooke v. Enderby* (a), *Simson v. Ingham*. (b)

Had the parties been sent at first to try the question at law, there might have been no objection to such a course. But, after a court of equity has taken cognizance of the transactions, and made them the subject of long and expensive investigation, it is bound not to send the parties to another tribunal, and must itself decide the question.

Sir *Charles Wetherell*, Mr. *Taunton*, Mr. *Bickersteth*, Mr. *Garratt*, and Mr. *Roots*, in support of the order of the Vice-Chancellor, and of the exceptions.

Upon the fair construction of the guarantee, it ought to be deemed a security for the monies which should be advanced to *Stokes* by the bank; and the conduct of the parties shews, that this was the mode in which they understood it. The bank, in 1806, was the same bank as existed in 1802; no change had taken place in it, further than was provided for by the original articles, under which it existed. If, after the death of *Harding*, a new partner had been introduced by the act of the executors, a ground might have been laid for the arguments which have been used on the other side. But here there was no new agreement; and how could a new partnership be formed without a new contract? Down to 1807, the partnership existed and was carried on under the articles of 1792; and a transmission of interest, upon an event provided for by the articles, to persons specified
 in

(a) 2 *Brod. & Bing.* 70.

(b) 2 *B. & C.* 65.

in them, could not give rise to a new partnership. The executors of *Harding*, so far as they interfered with the concern, acted under those articles. They had no beneficial interest in the business, but interfered in it only as agents on behalf of persons on whom, by the original constitution of the partnership, certain benefits were conferred. At law, the true partners, after the death of *Harding*, were *Oakes* and *Willington*; but they were trustees, as to a certain share of the profits, for the executors, and were bound to permit the executors or their agents to inspect the management of the business. The consequence will be, that the guarantee will extend to the whole balance mentioned in the bond, or to such balance as, upon an account being taken, shall be found to have been then due from *Stokes* to the bank.

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But if the Court shall be of opinion that a new partnership was formed after *Harding's* death, the account between *Stokes* and the bank must be separated into two portions, and it will be impossible to refer the items of credit in the latter account to the items of debit in the former; for payments made to one partnership cannot go in discharge of a debt due to another partnership. Suppose a customer to be indebted to a partnership of *A.*, *B.*, and *C.*; *A.* dies, and *B.* and *C.* form a new partnership with *D.*; the customer then makes payments to and draws monies from *B.*, *C.*, and *D.*: on what principle can the payments made to *B.*, *C.*, and *D.*, be appropriated, by the mere force of legal implication, to the satisfaction of a debt due to *A.*, *B.*, and *C.*? *Clayton's* case has no resemblance to the present. In the first place, in *Clayton's* case the transactions of the customer were with the surviving partners of the old firm; here the whole argument of the Plaintiffs proceeds on the supposition, that the transactions of *Stokes* with the bank, after *Harding's* death, were dealings, not with the sur-

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viving partners of the old firm, but with a new company consisting of those surviving partners and the executors of *Harding*. Secondly, in *Clayton's* case the question was as to payments made by the bank to the customer; here it relates to payments made by the customer to the bank. It was the duty of the surviving partners to pay off the debts of the old firm, and, therefore, the payments, made by them to the customers of the old firm, might be fairly appropriated to the discharge of the debts previously owing to their customers. But it is not the duty of a customer, who owes money to *A.*, *B.*, and *C.*, to make payments to *B.*, *C.*, and *D.*; nor can payments so made, particularly if he is at the same time contracting a new debt with *B.*, *C.*, and *D.*, be applied, on any sound principle, to the satisfaction of a demand in which *D.* had no concern. In *Bodenham v. Purchas*, the balance due from the obligor had, by his direction, been transferred by the obligee to the account of another person, who assented to be charged with the debt; and it is not necessary to look to any other circumstance, in order to support the decision to which the Court of King's Bench there came. The judgment cannot be supported on the mere authority of *Clayton's* case; for the doctrine, on which *Clayton's* case proceeds, cannot, in sound reasoning, be applied to the state of circumstances which existed in *Bodenham v. Purchas*. At all events, the question is one purely legal, and should, therefore, be sent to a court of law.

Nov. 22.

The LORD CHANCELLOR,

I cannot entertain for a single moment the idea of sending this question to be decided at law. An action was brought on the bond twenty years ago; that action was stayed by injunction; and, in 1809, a reference was directed to the Master. To send the matter in this stage of the proceedings to a court of law, would be to render fruitless

fruitless all the inquiry which has taken place here, and to throw away the time and expense which that inquiry has consumed.

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The first question is upon the meaning of the deed of guarantee. Does it apply to the case of advances made to *Stokes* by a new partnership — by a partnership consisting of another person or other persons in addition to the members who constituted the partnership in *January* 1812, or the survivors of them? The guarantee is expressly stated to be “for all sums of money not exceeding 20,000*l.*, which were then or should afterwards become due from *Stokes* to *Harding, Oakes, and Willington*, and the survivors or survivor of them, or the executors or administrators of such survivor.” It is therefore clear, on the legal construction of the instrument, that it does not apply to the case of advances made by a partnership consisting of *Oakes, Willington*, and another person, who was not a member of the firm on the 4th of *January* 1802.

The next question is, Has there been a new partnership? By the articles *Harding* had the power of bequeathing or assigning his share of the business and the future profits, after his death, to or in trust for his wife or children. Accordingly, by his will he gave his share of the business and the future profits to his executors in trust for his children. In a question of this kind the trust is wholly immaterial: the bequest conveys the legal interest in the partnership to certain persons. These individuals assist and take, or at least there is one of them, who assists and takes, a principal share in the management of the concern: according to the admissions in the answer and the affidavits, they share in the profits; and all this is confirmed by a reference to the partnership books, in which there is a profit and loss account, shewing that profits had been realised every year. If the

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executors did not share in those yearly profits, *Willington* and *Oakes* have the means of proving that fact, and they have not attempted to do so. I must, therefore, hold, that, upon the death of *Harding*, his widow and the other executors became partners with *Willington* and *Oakes* in this banking concern.

The third question is, Whether the balance, due from *Stokes* to the bank at the time of *Harding's* death, has been discharged by his subsequent payments? and that point is decided by *Clayton's* case, and *Bodenham v. Purchas*. It is true that the facts here are not, in every respect, precisely the same with the circumstances of these two cases; but the decisions in them proceeded on a broad general principle, equally applicable to the state of circumstances existing here. Where divers debts are due from a person, and he pays money to his creditor, the debtor may, if he pleases, appropriate the payment to the discharge of any one or other of those debts; if he does not appropriate it, the creditor may make an appropriation; but if there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. Here it is not pretended that any distinct appropriation of the payments was made by the parties. It was the practice of the bank to settle their accounts with *Stokes* quarterly; transferring, at the end of each quarter, the balance then due from him to the account of the next quarter. *Harding* died in the middle of a quarter; but, on that occasion, no change took place in the mode of settling the accounts. At the end of the then current quarter, the balance was struck exactly as if *Harding* had been alive, and no notice was taken of his death. There being no distinct

tinct appropriation of the payments either by the one party or the other, the law makes the appropriation with reference to the order of the items of the account. If so, the debt, which *Stokes* owed to the bank at the time of *Harding's* death, has been discharged by the subsequent payments.

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In *Bodenham v. Purchas* a court of law confirmed the rule which Sir *William Grant* had laid down in a court of equity. The point was again brought into discussion in *Simson v. Ingham* (a); and the principle was again confirmed, though the particular circumstances of the transaction produced a different decision. In that case, two accounts were formed by a *London* bank at the death of one of the partners in a country bank, which dealt with them — the one was styled the old account — the other, the new; and in the latter, the *London* bank entered all the payments made to them by the country bank, after the death of that partner; so that a distinct appropriation was made. The same question arose in *Brooke v. Enderby* (b), before the Common Pleas; and there, too, the principle of *Clayton's* case was adopted.

Feeling myself bound by the force and authority of these decisions, and acquiescing completely in the reasoning of Sir *William Grant*, I must decide that there was no debt due to *Oakes* and *Willington* under the indenture of the 4th of *January* 1802, at the time when the memorandum was indorsed on the bond. The consequence is, that the order of the Vice-Chancellor must be reversed, and the exceptions overruled.

The fund in Court was ordered to be paid to the Plaintiffs.

(a) 2 B. & C. 65.

(b) 2 Brod. & Birg. 70.

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Nov. 25.

1828.

Nov. 20.

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P. B., on his daughter's marriage, settled a sum of money on her and her husband and their issue; and, after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and if he died in-

testate, or

omitted to make such provision, that his executors should pay to the trustees as great a share of his property as any of his younger children should, in that event, become entitled to: Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death.

THE facts of the case, and the deed, on the construction of which the question in dispute between the parties depended, are stated in the report of the re-hearing of the cause before the Vice-Chancellor. (a)

The decree made on the re-hearing directed, that the decree pronounced on the original hearing should be varied by omitting such part thereof as declared, "that the testator was bound by the covenant in the settlement, dated the 1st day of *June* 1803, to make a provision for his daughter *Margaret*, her husband, and the issue of the marriage, including the sum of 1400*l.* advanced at the time of the marriage, equal to the share of any younger child either in his real or personal estate, by provision or gift in his lifetime, or by his will, to take effect upon his death, and as referred it to the Master to inquire what provision or gifts were made by the testator in his lifetime, or by his will, in favour of his younger children out of his real and personal estate;" and it proceeded to declare, that the testator was bound by such covenant to give or provide for his said daughter, her husband, and the issue of their marriage, only as full and great a part and share of his estate, effects, and property, as any of his other younger children would become

(a) 1 Sim. & Stu. 525.

become entitled to, in the event of his death, whether to take effect in possession at his own death, or at the death of his wife, in the said settlement named, if she should happen to survive him.

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The Plaintiffs appealed.

Mr. *Heald*, Mr. *Roupell* and Mr. *Preston* for the Appellants.

The contract of the parties is to be found in the first branch of the covenant. *Patrick Black* there binds himself to give, by his will or otherwise, to the persons interested under the settlement, as large a proportion of his estate, as he shall, by will or otherwise, give to any other of his younger children. Had no other words been added, not even a doubt could have been suggested; and, on the death of the settlor, the Plaintiffs would have had a right to the relief which they now seek, whether his wife had been then living or not. But it was his intention to retain the power of making a provision for his wife, controlled by this engagement; he therefore declares, that it was not till the death of the survivor of himself and his wife, that the addition was to be made to Mrs. *Formby's* portion; and this declaration is contained in the words, "to take effect on the death of the survivor of himself and his present wife." These words point out the time before which the settlor was not to be bound to make the additional provision for Mrs. *Formby*, to take effect in possession, and beyond which the enjoyment of it by her, her husband, and her children, was not to be postponed: they do not describe or qualify the species of provision given to any younger child, to which Mrs. *Formby's* was to be made equal. Though they stand at the end of the first branch of the covenant, they ought to be read as if they preceded the words, "as he shall by his said will," &c.

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The construction adopted by the Vice-Chancellor would limit the operation of the covenant, so as to render it practically of no avail. It would leave *Patrick Black* at liberty to give as much as he pleased to any of his younger children, provided it was not a gift which was to take effect on the death of the survivor of himself and his wife. If he made a gift to any of his younger children, to take effect either immediately in his lifetime, or subject to a life estate reserved to himself alone, or to his wife alone, or if he bequeathed to a younger child without reference to the death of his wife, and died in his wife's life-time; in all these events *Mrs. Formby*, according to the decree of the Vice-Chancellor, would have no claim to any addition to her fortune: but her claim would arise, if the gift or bequest to a brother or sister was postponed till the death of the survivor of her parents. What reason can be conceived, why *Mrs. Formby's* right to an equal portion with her brothers and sisters should be dependent on that circumstance? The deed recites that the father had agreed "to make a further provision for his daughter, equal to his younger child or children:" the intention of the parties was, to enter into a covenant by which an equality of portion would be assured to her; but that contract is reduced to a nullity, if the father is to be at liberty to dispose of his property among his younger children, to her exclusion, provided only that he does not make that disposition in one particular form of limitation.

The contract of the parties being contained in the first branch of the covenant, it is not necessary to refer to the second branch, which was not intended to vary or modify the contract, and merely prescribed what was to be done by his real and personal representatives, in case he omitted to perform his engagement, or happened to die intestate. If he omitted to perform his engagement,
Mrs.

Mrs. *Formby's* portion was to be made equal to that share of his property, to which any of his younger children should in that event become entitled; if he died intestate, the same rule was to be observed; and, in estimating the share to which any younger child would under those circumstances be entitled, advancements, made in his lifetime, would necessarily be brought into computation. "In that event," is equivalent to, "if he, *Patrick Black*, should happen to die intestate, or if he should omit to make such provision for the parties interested under the settlement as had been previously stipulated for." The Vice-Chancellor has considered it as synonymous with "upon his death;" a construction which is not conformable either to the strict import of the words, or to their connection with the preceding words.

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Besides, the construction adopted by the decree renders the two branches of the covenant inconsistent; for, by the first branch, Mrs. *Formby's* portion is to be made equal to what any younger child shall become entitled to on the death of the survivor of the settlor and his wife; and by the second branch, it is to be equal to what such a younger child shall become entitled to on the death of the settlor. The death of the settlor, and the death of the survivor of the settlor and his wife, are quite distinct events.

In ascertaining the amount of the advancements to the younger children, those which were made prior to the date of the settlement must be taken into account, as well as those which were made afterwards. If, however, the Court should think that the contract was merely prospective, and that the account is to be confined to subsequent advancements, then the 1400*l.*, which was settled by the father at the time of the marriage, must be excluded from the computation.

Mr.

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Mr. *Pepys* and Mr. *Tinney*, for some of the Defendants.

The decree reads the words of the first branch of the covenant in their natural sense, and in their actual order and connection: the appeal calls upon the Court to change the structure of the sentence altogether, in order to effect an intention which is nowhere expressed in the instrument. The settlor meant to bind himself only as to the disposition of his property at his death: his dominion over it during his life was to remain uncontrolled and unfettered. He might have given his whole fortune to strangers; upon the marriage of any of his younger children he might have assigned the whole of it to trustees for the benefit of the husband or wife of that child and their issue. There is, therefore, no ground for alleging that his power of disposition during his life, either to his younger children or to any other person, was intended to be restrained. The purpose of the parties was, to secure to Mr. and Mrs. *Formby*, at the death of the settlor, a share of his fortune equal to what any other of his younger children should then become entitled to.

Mr. *Koe*, for other Defendants, cited *Jones v. Martin* (a), *Lewis v. Madocks* (b), *Fortescue v. Hennah* (c), *Cochran v. Graham*. (d)

The LORD CHANCELLOR.

According to my present impression, the words "to take effect on the death of the survivor of himself and his present wife," notwithstanding their position at the end of the first branch of the covenant, ought to be read as if they stood before the words "as he shall by his will

(a) 3 *Anstr.* 882.

(b) 8 *Ves.* 150.

(c) 19 *Ves.* 67.

(d) 19 *Ves.* 63.

will, or otherwise give to any of his younger children." Then, the meaning of the next part of the covenant is clear and distinct; and there is nothing in the latter part of the covenant to vary that construction.

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Upon the marriage of *Richard Formby* with Miss *Black*, the daughter of *Patrick Black*, 1400*l.* was settled by the lady's father upon the husband and wife, and upon the issue of the marriage; and in the settlement was contained a covenant, upon the construction of which the present question arises. The covenant is in these words—"And, for the considerations aforesaid, the said *Patrick Black* doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said *William Black* and *Richard Willis* (who were the trustees), their executors and administrators, in manner following; that is to say, that he, the said *Patrick Black*, by his last will and testament, or otherwise, shall and will give, devise, bequeath, or otherwise settle and secure to or in favour of the said *Richard Formby* and the said *Margaret*, his intended wife, and to and for the issue of the said intended marriage, upon the trusts nevertheless aforesaid, as full and great a part and share of his estates, effects, and property, as he shall by his said will or otherwise give or provide to or for the use of any of his other younger child or children, to take effect on the death of the survivor of himself and his present wife; and, also, that in case he, the said *Patrick Black*, shall happen to die intestate, or omit to make such provision or bequest to the use or in favour of the said *Richard Formby* and the said *Margaret*, his intended wife, and to and for the issue of the said intended marriage, the heirs,

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heirs, executors, or administrators of the said *Patrick Black* shall and will pay or cause to be paid to the said *William Black* and *Richard Willis*, or the survivor of them, his executors or administrators, as full and great a part and share of the estates, effects, and property of the said *Patrick Black*, as or to which his younger child or children shall in that event become entitled."

This covenant divides itself into two parts. In the course of the argument it was so divided and so considered; and it was so divided and so considered by the Vice-Chancellor on both occasions, when he gave his judgment. The first question is as to the meaning of the former part of the covenant. In substance it is this—that the father, for the considerations aforesaid, stipulates, that he will give to the parties to the marriage, and to their issue, by his last will or otherwise, as large a proportion of his property, as he shall, by his last will or otherwise, give to any of his younger children, to take effect on the death of the survivor of himself and his then present wife; and the question on this part of the instrument is, as to the true construction of the words "to take effect after the death of himself and his present wife."

In reading this part of the covenant, I have rested on the conclusion which I originally formed, that those words relate entirely to the first clause of this part of the covenant, and that, in point of fact, the true construction is this — 'that I, the settlor, will give to the parties to the marriage, and to their issue, so much of my property, (that gift to take effect at the death of the survivor of myself and wife), as I shall give to any of my younger children by my will or otherwise.' It was contended in the argument, that these words "to take effect at the death of himself and his present wife," applied to both clauses in this part of the covenant. In that case
the

the covenant would be read thus: "I will give, by will or otherwise, to the parties to the marriage, and to their issue, as great a part of my property, that gift to take effect on the death of myself and my present wife, as I shall, by will or otherwise, give to any of my younger children, to take effect upon the death of the survivor of myself and my present wife."

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I think the latter interpretation, which has been adopted by the court below, is not reconcilable with the obvious purposes of this deed, or the language of the covenant. Suppose a disposition was made by *Patrick Black* in favour of any of his younger children, to take effect upon the death either of him, *Patrick Black*, or of his wife; that would be a case not provided for by the covenant, if the construction put upon it by the Vice-Chancellor be a sound interpretation; and, under such circumstances, the parties, who were intended to take a benefit under this covenant, would have no claim. I think, therefore, that the words "to take effect on the death of the survivor of himself and his present wife," relate, in point of construction, to the time when the gift to the parties to the marriage, and to their issue, is to take effect, and that the first part of the covenant is free from all reasonable doubt.

Upon the supposition that the first part of the covenant was ambiguous, the end of the latter part of the covenant was called in for the purpose of putting a construction on it; and I now direct my attention to the latter part of the covenant to see whether, even assuming the former part to be ambiguous, the construction, which was put on the latter part of the covenant, with a view of removing the ambiguity, is the correct construction. The words are, — "and also, that in case, he, the said *Patrick*

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Black, shall happen to die intestate, or omit to make such provision or bequest to the use or in favour of the said *Richard Formby* and the said *Margaret*, his intended wife, and to and for the issue of the said intended marriage, the heirs, executors, or administrators of the said *Patrick Black* shall and will pay or cause to be paid to the said *William Black* and *Richard Willis*, or the survivor of them, his executors or administrators, as full and great a part and share of the estates, effects, and property of the said *Patrick Black* as or to which his younger child or children shall in that event become entitled."

Now what is the meaning of the words, "shall in that event become entitled?" The stipulation is this — that, in case *Patrick Black* shall die intestate, or shall omit to make that disposition of his property which he has stipulated he shall make, then the parties, interested under the settlement, are to have a claim upon his heirs and representatives for compensation out of his property; and the compensation is to consist of "as full and great a part and share of the estates, effects, and property of the said *Patrick Black*, as or to which his younger child or children shall in that event become entitled."

Now, "in that event," has been supposed to mean "upon his death;" but I apprehend the true meaning to be this — "in the event of his dying intestate, or omitting to make the specified disposition of his property." "In that event," is not to be confined simply to the circumstance of his death: it is not meant to be equivalent to the words "on his death," and is to be referred to the event of his dying intestate, or without making a will in conformity to his stipulation. And in that view, the words are perfectly reconcileable with the former part of the covenant.

covenant. The only difficulty is as to the words, "to which his younger child or children shall become entitled." Now, I apprehend for the purpose of ascertaining what a younger child would be entitled to in case of intestacy, the law would have taken into consideration what the party had previously received; and I think that, in framing the covenant, it was the intention of *Patrick Black* to consider what the party had previously received in addition to what he would receive under the will — which satisfies the words, "to which he shall in that event become entitled."

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Under these circumstances, I concur, not with the second, but with the first, decree of the Master of the Rolls, except only that in one point the first decree ought to be varied: for the language of the settlement is every where prospective; the arrangement of the property is to be prospective from the period of the settlement, and is not to include any disposition of property anterior to that period. Nothing, therefore, must be taken into the account, except advances made by *Patrick Black* subsequent to the date of the settlement. The 1400*l.*, included in the settlement, must not be taken into the account. That portion, which was advanced on the occasion of the marriage, comes within the spirit of the covenant; and there is nothing in the terms of the covenant to exclude it.

I ought to mention, with respect to the words in the first part of the covenant, "to take effect on the death of the survivor of himself and his present wife," that there appears to have been so much difficulty in bending them to the interpretation put upon the covenant by the Master of the Rolls in the second decree, that those words have been entirely altered in that decree, and for

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them there have been substituted the words, "upon his death or upon the death of his wife." It was found that the words in the covenant must be altered, in order to support the decree which has been pronounced.

Nov. 23.

ATTORNEY-GENERAL v. BUTCHER.

Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance.

ON an appeal from a decree of the Master of the Rolls, which directed costs to be paid by the Defendants, the Lord Chancellor was of opinion that there was no ground for varying the order in the principal point complained of. But the Appellants contended, that, even if the substantial part of the decree was right, the circumstances of the case were such that costs ought not to have been given against the Defendants; and though they could not have appealed on the ground of costs being improperly given, yet, as there was an appeal on another point, the decree, though not varied in that other point, ought to be rectified in the direction as to payment of costs.

Mr. *Blunt*, for the Appellants.


In *Turner v. Turner* * (a) the bill was dismissed with costs; the cause was re-heard merely on the question of

(a) 2 *Eq. Ab.* 238. pl. 18.

* In that case the bill was filed in the name of an infant; an issue had been directed, in which the defendant prevailed; the next friend then died; the infant attained his age, but did not proceed in the suit, and the defendant brought it to a hearing on the equity reserved, when it

was dismissed with costs. The question on the re-hearing was, whether the Court could give costs against a plaintiff, in whose name a suit had been conducted during his infancy, but who had not taken any proceedings in it after he became an adult.

of costs; and the final decree was, that the bill should be dismissed without costs. Decrees may, on appeal, be varied as to costs, though affirmed on every other point. (a) *Squire v. Pershall* (b), *Pitt v. Page* (c), *Wickett v. Baby* (d), *Maguire v. Madden*. (e)

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The rule is, that you cannot appeal for costs alone. But if a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed on the substantial ground of appeal. But if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the question of costs. I consider this to be in substance an appeal for costs only; I must, therefore, refuse to vary the decree as to costs.

Appeal dismissed with costs.

(a) See *Beames on Costs*, 189—
 194.
 (b) 2 *Bro. P. C.* 396.

(c) 1 *Bro. P. C.* 1.
 (d) 1 *Bro. P. C.* 586.
 (e) 1 *Bro. P. C.* 593.

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Nov. 26.
Dec. 13.*In re* HOLMES.

Under a commission of lunacy, which had issued against Mr. *Holmes*, the jury found, "that the party is not a lunatic, but that, partly from paralysis and partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, and, consequently, of unsound mind, and that he has been so for the term of two years last past." — The inquisition was quashed, and a new commission was ordered to issue.

UNDER a commission of lunacy, which had issued against Mr. *Holmes*, the jury found "that the *William Holmes* is not a lunatic, but that, partly paralysis and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last past."

Upon this finding, a petition was presented by the daughter and only child of the alleged lunatic for the appointment of a committee.

A cross petition was presented in the name of *Holmes*, but in reality by his wife, praying that the inquisition might be quashed.

Mr. *Horne* and Mr. *Wright*, for the supposed lunatic.

This verdict is no answer to the inquiry which the jury were directed to make. The only fact, which the jury have found, is, that, partly from paralysis and partly from old age, Mr. *Holmes's* memory is so much impaired, as to render him incompetent to the management of his affairs. In *Barnsley's case* and in *Cranmer's case* (b), a similar finding was deemed insufficient. The defect is not cured by the addition of the clause, "and consequently of unsound mind," for these words are not a distinct and independent

(a) 5 *Ath.* 168.(b) 12 *Ves.* 445.

ing, but merely express an inference which the jury have drawn from the fact which they had previously found. The statute *de prerogativa regis* and the old authorities shew, that persons in the situation, in which this gentleman appears to be, were not intended to be the objects of a commission of lunacy.

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The LORD CHANCELLOR.

It is not necessary to go back to old authorities. We have the law, as it is now to be administered, clearly expounded by Lord *Eldon* in *Ridgway v. Darwin*. (a) "I have reason," says Lord *Eldon*, "to believe, the Court did not, in Lord *Hardwicke's* time, grant a commission of lunacy in cases in which it has been since granted. Of late the question has not been, whether the party is absolutely insane; but the Court has thought itself authorised (though certainly many difficult and delicate cases with regard to the liberty of the subject occur upon that) to issue the commission, provided it is made out that the party is unable to act with any proper and provident management, liable to be robbed by any one, under that imbecility of mind not strictly insanity, but, as to the mischief, calling for as much protection as actual insanity." He adds — "Finding, when I came here, a course of cases establishing this authority, and feeling a strong inclination to maintain it, or that the legislature should take measures to preserve persons in a state of imbecility, laying them as open to mischief as insanity; till those decisions are reviewed, I will not alter them." The law, thus stated by Lord *Eldon*, has been acted upon for years: it has been acted upon in the view of the legislature: the legislature has not thought proper to interpose; and we must, therefore, take the law to be as thus expounded.

Mr.

(a) 8 *Ves.* 66, 67.

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HOLMES.

Mr. *Sugden*, Mr. *Phillimore*, and Mr. *Clinton*, in support of the inquisition.

Where the jury do not find the person to be of unsound mind, the inquisition cannot stand, because no traverse could be taken upon it. If the finding here had merely been, "that Mr. *Holmes's* memory was so much impaired as to render him incompetent to the management of his affairs," the case would have been similar to *Ex parte Cranmer* (a) and *Ex parte Barnsley* (b); and it would have been impossible for the supposed lunatic, if he had chosen to traverse, to have taken issue on any point, except whether his memory was impaired in the degree and manner mentioned in the verdict. But here there is a distinct finding, that Mr. *Holmes* "is of unsound mind:" that distinguishes the present case from the authorities which have been cited, and tenders a definite and proper issue, on which a traverse might be taken.

The LORD CHANCELLOR.

The finding here is consequential, and the impaired memory of this gentleman is the foundation of it. The jury state one of the effects or consequences of unsoundness of mind, and they thence draw the conclusion of unsoundness. Where a jury state their premises and draw their conclusion, and that conclusion does not necessarily follow from the premises which they state, we must not take the conclusion as a finding by itself.

Mr. *Sugden* continued. If the jury had not drawn the conclusion, it might have been improper for the Judge to have drawn it; because it is in the hands of the jury that the constitution of the country has placed the power of determining on soundness or unsoundness of mind. Though the conclusion may not follow necessarily from

(a) 12 *Vesey*, 415.

(b) 5 *Alk* 168.

from the premises, it is unquestionably a conclusion which may be fairly drawn: the jury, having the whole evidence before them, have chosen to draw it; and the Court will act upon the conclusion to which they have come.

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It is impossible to mistake what the object of the jury was. They wished to find that he was of unsound mind, so as to render him a fit object for the protection of this Court; at the same time, they wished to negative that species of unsoundness commonly called lunacy. Their anxiety was to point out the nature and origin of the mental unsoundness under which this gentleman labours.

Mr. *Horne*, in reply.

The LORD CHANCELLOR.

I think it unsafe that this verdict should stand. The finding here is very similar to what was found in *Cranmer's* case. (a) There the verdict was, "that *Henry Cranmer* is so far debilitated in his mind as to be incapable of the general management of his affairs." What did Lord *Erskine* say on that occasion? "How can I tell, what is *so far* debilitated in his mind, as not to be equal to the general management of his affairs? Suppose he was a farmer, and his understanding was so far debilitated that he could not manage his farm, though competent to common purposes." What are the affairs to the management of which he is incompetent? Those affairs may be of such a nature, that a certain degree of impairment of memory may render him incompetent to the management of them, and yet he may not be of unsound mind.

Here

(a) 12 *Ves.* 445.

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HOLMES.

Here the jury, having merely found generally, that, partly from paralysis and partly from old age, this gentleman's memory is so much impaired as to render him incompetent to the management of his affairs, go on to say, "and consequently he is of unsound mind." I am not satisfied that the consequence follows necessarily from these premises; and, unless I were satisfied that the consequence does follow necessarily, I cannot allow the verdict to stand.

A new commission must issue.

Dec. 13.

The Court will protect the property of a supposed lunatic in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury; but it will, at the same time, take care, that ample means for resisting the commission be furnished to those who act, in the inquiry, on the alleged lunatic's behalf.

A few days afterwards a petition was presented in the name of Mr. *Holmes*, stating that the parties, who had applied for the commission of lunacy, had caused a *distringas* to be issued out of the Exchequer, by which he was deprived of the disposal of stock standing in his name; and that they had also given notice to his tenants not to pay the rents to him or his agents. The prayer was, that they might be directed to withdraw their notices, and might be restrained from intermeddling with his property; and that such order as was just might be made with respect to the *distringas*.

Mr. *Horne* in support of the petition, contended, that, until Mr. *Holmes* was found a lunatic, neither the Court nor any individual had a right to interfere with him in the disposition of his property. The measures, which had been adopted, would deprive him of the means of effectually resisting the new commission.

Mr. *Sugden*, *contra*.

We have not applied for the aid of the jurisdiction in lunacy to protect the property of Mr. *Holmes*, though
we

we have an unquestionable right to do so; for, the moment a petition is presented in lunacy, the Great Seal will take care that the property of the alleged lunatic is not wasted during the interval which may elapse before the result of the inquisition is ascertained. Circumstances have occurred in this case which shew that, unless precaution be taken, the fortune of the lunatic will suffer greatly by the proceedings of those who have possession of his person, and use his name for their own purposes. The Court, therefore, will not interfere to prevent us from taking the best precautions we can; it ought rather to assist us. We have no wish to deprive those, who resist the commission, of the pecuniary means which may be fairly wanted for that purpose.

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In re
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The LORD CHANCELLOR.

It is absolutely necessary that the friends of Mr. *Holmes* should have the pecuniary means of resisting the commission; but, at the same time, his fortune must be preserved from all improper interference. It is the duty of the Court to protect his property. The best course will be for the parties to make some arrangement, by which, while ample means for conducting the inquiry are furnished, the property will remain secured.

There will be no objection, on the part of those who prosecute the commission, to withdraw the notices to the tenants; and the amount of the rents will probably be sufficient for the purposes of Mr. *Holmes*, or those who act in his name. If that will be sufficient, I certainly think it better that the money in the funds should not be touched, unless it is wanted for some particular purpose.

On the inquisition held under the second commission, the jury found that Mr. *Holmes* was of unsound mind.

1827.

Nov. 26.

Ex parte PALMER *in re* DANIELL.

The Court will decide, in the first instance, on alleged impertinence in affidavits sworn in bankruptcy, where the impertinence is of such a kind, that there would be nothing gained, in point of convenience, by directing a reference to the Master.

An affidavit, verifying a shorthand writer's notes of a trial at *Nisi Prius*, which involved the same question as is raised on a petition in bankruptcy, is wholly impertinent.

IN the proceedings on a petition in the matter, an affidavit had been made, setting forth and verifying a shorthand writer's note of a trial at *Nisi Prius* between parties who were not the same as the parties to the petition, but which, it was alleged, involved the same point as was raised on the petition, and depended on similar circumstances. A petition was now presented, praying that the affidavit might be taken off the file as impertinent.

In support of the application it was contended, that the facts mentioned in the affidavit could not be evidence between the parties to the petition, and, therefore, as the affidavit was wholly immaterial, the Court would at once order it to be taken off the file.

It was objected that the application was irregular, for the proper course was, to have the affidavit referred to the Master for impertinence; and that reference might be had as a matter of course. The statements contained in the affidavit were such as it was fitting and even necessary to bring under the consideration of the Court, and, therefore, they could not be impertinent.

Sir Charles Wetherell, in reply, denied that it was a matter of course, either in bankruptcy (a) or lunacy, to refer petitions and affidavits for impertinence. In Lord

Portsmouth's

(a) *Ex parte Simpson*, 15 Ves. 476.

Portsmouth's case, Lord *Eldon* stated, that it would be a most mischievous thing, if a petition, addressed to the person holding the Great Seal, which it is the duty of that person to read, might, as a matter of course, be referred to the Master for impertinence.

1827.
Ex parte
PALMER
in re
DANIELL.

The LORD CHANCELLOR.

As the impertinence complained of here depends on a simple point, the Court can judge of it in the first instance; and there would be neither use nor convenience in sending it to the Master.

The affidavit could not be read as evidence between the parties to the petition. The matter contained in it can be used only as precedent, and not as evidence; and a precedent is never verified by affidavit. I shall order the affidavit to be taken off the file; and the parties, who filed it, must pay to the petitioner the costs of it and of the application.

Sir *Charles Wetherell*, Mr. *Horne*, Mr. *Sugden*, Mr. *Treslove*, and Mr. *Montagu*, were for the different parties.

1827.

Dec. 8.

HUGHES v. BIDDULPH.

A Defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, made in the relation of solicitor and client during the progress of the suit, or with reference to it, previous to its commencement.

THE Defendant had admitted in her answer, that she had in her possession various papers and letters relating to the matters of the suit, but submitted, without assigning any specific reason, that she was not bound to produce them. A list of them was set forth in the schedule. The Vice-Chancellor had made the usual order for their production.

An affidavit was subsequently made, that many of the papers and letters were communications which had passed between her and her country solicitor, Mr. *Douglas*, or her town solicitor, Mr. *Williams*, or between Mr. *Douglas* and Mr. *Williams*; and upon that affidavit a motion was made to discharge so much of the order of the Vice-Chancellor as compelled the production of those communications. *Douglas* and *Williams* were not only her solicitors, but acted as her agents generally in the management of her affairs.

Mr. *Temple* and Mr. *Pemberton*, for the motion.

Confidential communications between a client and her solicitor ought to be protected. "It is much to the credit of the defendant," says Lord *Alvanley* (a) "to have stated all this evidence from his confidential letters; otherwise I do not know how the Plaintiff could have compelled him to produce them." *Cromack v. Heath-*
cote,

(a) 3 *Ves.* 179.

*cote (a), Gardiner v. Mason (b), Wright v. Mayer (c),
Atkyns v. Wright (d), Evans v. Richard. (e)*

1827.

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Mr. Sugden and Mr. Jacob, *contra*.

It has been determined in the House of Lords, that a party is bound to produce even a case which has been laid before counsel for their opinion. If such a document as that must be produced, why should communications between the Defendant and her solicitor be protected? *Douglas* and *Williams* are her agents, as well as her solicitors; and they were her agents in the very matters which are the subject of the suit. If she wished to raise a question as to the production of any of the papers, she ought to have distinguished those in her schedule: not even in her affidavit has she enabled the Court to say, what the specific documents are, which she claims to have excepted from the order.

The LORD CHANCELLOR stated his opinion to be, that confidential communications between the Defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; but that all the other papers ought to be produced.

The order made was as follows: —

“ His Lordship doth order that the Defendant, *Charlotte Myddleton Biddulph*, do, within a week after service of the order, leave in the hands of her clerk in court

(a) 2 *Brod. & Bing.* 4.

(d) 14 *Ves.* 211.

(b) 4 *Bro. C. C.* 479.

(e) 1 *Swanst.* 8.

(c) 6 *Ves.* 280.

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court in this cause the several letters, and copies of letters, and also the notes, documents, and writings, mentioned and set forth in the schedule to the two several answers of the said Defendant filed in this cause, and by her said several answers admitted to be in her possession and power, excepting the deeds therein mentioned, and excepting such of the said letters, copies of letters, notes, documents, and writings, as the Defendant shall declare upon her oath to have passed between her and *Robert Archibald Douglas* and *John Copner Williams*, merely in the relation of solicitor and client, and to have passed in the progress of this cause, and with reference to this cause, previously to its being instituted; and excepting also such of the said letters, copies of letters, notes, documents, and writings, as either the said Defendant, or the said *R. A. Douglas*, shall declare upon her or his oath to have passed between them, the said *R. A. Douglas* and *J. C. Williams*, merely in the relation of country solicitor and town solicitor, and to have passed in the progress of this cause, or with reference to this cause previously to its being instituted, such letters, copies of letters, notes, documents, and writings, to be particularised and verified in such affidavits: and it is ordered that the said Defendant be at liberty to seal up any part of those letters, which she upon her oath shall declare do not relate to any of the matters in question in this cause," &c.

1830.

VENT v. PACEY.

June 11.

THE bill was filed for the specific performance of an agreement alleged to be contained in a correspondence between the parties.

A Plaintiff is not entitled to the production of a letter, admitted by the Defendant to be in his possession, but which, the Defendant states, was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties.

The Defendant by his answer admitted, that he had in his possession divers papers relating to the matters in question, among which were several letters written by him to his solicitor, Mr. *Jebb*. One of these letters, he stated, was written in confidence to Mr. *Jebb* as his solicitor, and directed him to take the opinion of counsel upon the question in dispute between the parties; and he insisted that he was not bound to produce it.

On the coming in of the answer, the Plaintiff moved for the production of all the papers which the Defendant admitted to be in his possession; and the Vice-Chancellor ordered all of them to be produced, except the letter stated to have been written in confidence to Mr. *Jebb*, and an opinion of counsel.

1829.
Dec. 22.

The Plaintiff now moved before the Lord Chancellor for the production of that particular letter.

1830.
June 11.

Mr. *Spurrier*, in support of the motion, contended, that, upon principle, it was impossible to distinguish the production of the instructions given by a client to a solicitor to lay a case before counsel from the production of the case itself, which the Court was in the constant habit of ordering, and had ordered in this

1880.

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v.

PACKY.

very suit. At common law the rule was, that no communication between a client and his attorney was considered confidential and privileged, unless it were made "for the purpose of bringing an action or suit, or related to a cause or suit existing at the time;" and in the late case of *Williams v. Mundie* (a) that rule was adopted and approved by Lord Tenterden. Mr. *Spurrier* referred also to the order made in *Hughes v. Biddulph*, as recognizing the same rule in equity.

Mr. *Barber* appeared to oppose the motion. (b)

The LORD CHANCELLOR considered, that, as the letter appeared to have been written after a dispute had arisen between the parties, with a view to taking the opinion of counsel upon the matter in question, and which matter afterwards became the subject of the suit, the production of it could not be enforced; and His Lordship refused the motion.

(a) 1 *Ryan & Moody*, 34.

(b) The argument and judgment are given *ex relatione* Mr. *Spurrier*.

1827.

DIMES v. SCOTT.

Dec. 7.
1828.
April 15.

C**A****P****T****A****I****N** *Piercy*, by his will, dated the 24th of *September* 1801, bequeathed all his ready money, securities for money, and all other his personal estate and effects not thereinbefore specifically disposed of, unto *John Atkins* and *John Corderoy*, upon trust to convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to stand possessed of, and interested in, the residue of the money to arise and be produced by his estate and effects, in trust, to place out or invest the same in or upon government or real securities, as to his trustees should seem meet, and to stand possessed of and interested in the money so to be invested or placed out at interest, upon trust, after paying certain annuities, to pay the interest, dividends, and annual produce to his wife *Mary* during her life; and, after her decease, to stand possessed of the principal, in the events which happened, in trust for *Elizabeth Wintersgill*, her executors, administrators, and

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for *A.* during her life, and, after her death, for *B.* The trustees permitted a share, which the testator had in an *Indian* loan, bearing interest at 10l.

assigns; per cent., to remain for several years on that security, during which time they paid to *A.* the interest at 10l. per cent., which it yielded annually; and, the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from the testator's death: Held,

That the tenant for life was not entitled to the actual interest, which the money yielded, while it remained on the *Indian* security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death;

That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the *Indian* rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the *Indian* security and invested in the 3 per cent. stock at the end of a year from the testator's death.

1827.

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assigns; and he appointed *Atkins*, *Corderoy*, and his wife *Mary*, executors of his will.

The testator died on the 30th of *January* 1802; and, shortly afterwards, his widow and *Corderoy* proved the will.

Part of Captain *Piercy's* property, at the time of his death, consisted of a sum of 2000*l.*, which, when in *Calcutta* in 1799, he had invested in a fund of the *East India* Company, called the Decennial Loan. That loan was irredeemable for ten years from the 1st of *January* 1800: it bore interest at the rate of 10*l.* per cent., payable annually, either in cash at *Calcutta* or by bills drawn upon the directors in *London*, and payable fifteen months after date. The principal was to be repaid at the end of ten years; a power, however, being reserved to the Company of postponing the payment for one or two years longer, upon paying, during such additional period, interest at either 10*l.* per cent. or 5*l.* per cent., according as the payment was to be made in *India* or in *London*. The shares in the loan were transferable.

Captain *Piercy*, before he left *India*, directed the interest on his portion of the loan to be paid to him in *London*.

The 2000*l.*, invested in this loan, remained upon that security till 1813, when the principal was paid off and laid out in the purchase of 3*l.* per cent stock. *Corderoy*, as executor and trustee, had, during all this time, received the interest, and paid it over to the widow, who had intermarried with a Mr. *Scott*.

In *June* 1820, *Elizabeth Wintersgill*, and her husband, filed their bill against the executors of *Corderoy*
and

and the widow of the testator for an account of his assets. The bill charged, that "the testator's interest in the decennial loan ought, as being a beneficial property, to have been sold, or otherwise the interest ought to have been invested as principal money for the benefit of the testator's estate; and that *Mary Scott* and *Richard Scott*, or the personal representatives of *Corderoy*, ought to be charged with the interest received by *Corderoy* and *Mary Scott* in respect of the said loan."

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SCOTT.

At the hearing, the common accounts were directed. The Master in his report allowed to the executors of *Corderoy* the payments of the interest on the decennial loan, which *Corderoy* had made to *Mrs. Scott*, the tenant for life of the residue.

The Plaintiffs excepted to this part of the report, on the ground that "*Mary Scott*, being only tenant for life of the residue, was not entitled to be paid the interest upon the subscription of 2000*l.* to the decennial loan, to the prejudice of the Plaintiff, who was the person entitled to the residue immediately after the death of *Mary Scott*; but that the interest upon the said subscription ought, as it became due and was received by *Corderoy*, to have been considered and treated by him as part of the general residue of the testator's personal estate, and, as such, laid out and invested, as directed by the testator's will, during the life of *Mary Scott*, and the interest thereof, when so laid out and invested, paid to her during her life."

Mr. Barber, in support of the exceptions.

1824.
August.

The decisions pronounced, and doctrines laid down by Lord Eldon, in *Gibson v. Bott* (a), *Howe v. Earl of Dartmouth* (b), and *Fearn v. Young* (c), establish the rule,

(a) 7 Ves. 89.

(b) 7 Ves. 157.

(c) 9 Ves. 549.

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rule, that, where a general residue of personal property is given to one person for life, with remainder over to others, that residue is to be considered as converted into 3 per cent. stock as soon as it could have been so converted, and the tenant for life is to take, not the actual profit which it has yielded in its unconverted state, but the dividends which would have arisen from it, if the conversion had taken place. The Court, the first moment its observation was drawn to the fact, would not have permitted property to be laid out or to remain upon such a security as the decennial loan, where the testator had directed the residue to be invested on government securities; "but it would immediately have ordered it to be converted into that which the Court deems, for the execution of trusts, a government security; and what the Court will decree, it expects from trustees and executors." (a) In *Fearn v. Young*, part of the residue had, under the articles of partnership into which the testator had entered, been continued to be employed, for some time after his death, as capital in the trade in which he had been concerned; and during that period it had yielded a profit considerably greater than the common rate of interest. The tenant for life claimed the profit as part of her income; but the Lord Chancellor held, that she was entitled only to interest at a given rate, and not to the profits actually made. The present case is similar in its circumstances, and comes clearly within the principle on which that case was decided. For the purpose of ascertaining the rights of the tenant for life, the decennial stock must be considered as converted into 3 per cent. stock at or shortly after the death of the testator; and the tenant for life can take only the dividends, which such 3 per cent. stock would have yielded. The extraordinary profit beyond that amount, which was actually produced by the investment in the decennial loan,

(a) 7 *Proc.* 150.

loan, is analogous to the profits of the trade in *Fearn v. Young*, and must be dealt with in the same way. It was a transient and perishable advantage, of which only so much goes to the tenant for life as the money would have produced, if it had been laid out according to the direction of the testator; the other part must be added to the general residue.

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DIMES
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Mr. Pemberton, contra.

The executor, finding a portion of the testator's property laid out in a profitable investment, suffered it to remain, and paid to the tenant for life the interest actually produced. The legatee in remainder might have called for the conversion of the fund; but, she not having done so, and the fund having actually yielded a certain yearly interest, the tenant for life was entitled to have that interest paid to her. The present case has no resemblance to any of the authorities which have been cited: leaseholds and long annuities are a perishing fund; they are yearly diminishing in value: every annual payment consists partly of what is truly a payment of interest, and partly also of what is a repayment of capital. Here the principal was not sustaining any diminution.

Even if it had been the duty of the executors to have sold the decennial stock, and invested the money in the 3 per cents., it does not follow that the executors should be made answerable for not doing so. There is no case in which executors have been held answerable for not making that conversion, which the Court, if the administration of the assets had been thrown on it, would have directed to be made. "I will not state," says Lord *Eldon* (a), "what the Court would do, when executors had

(a) 7 Ves. 150.



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had not made these conversions. That depends upon many circumstances."

LORD GIFFORD, MASTER of the ROLLS.

Aug. 19.

One principle of the Court is, that, where a testator gives a residue to a person for life, with remainders over, property comprised in that residue, being of a perishable nature, so that the *corpus* is becoming of less value from year to year, must be converted. Another principle is, that, if the residue comprises property of a reversionary nature, that too must be converted. The one rule protects the remainder-man; the other protects the tenant for life. But this is the first case, where the *corpus*, remaining imperishable, has produced, for a limited time, a larger interest than it would have yielded, had it been laid out in *England*. Here the principal was secure; but it was lent out in a foreign country at a higher rate of interest than could have been obtained at home. The question is, should the excess of interest thus obtained be applied to increase the *corpus* of the fund?

By the terms of the decennial loan the securities are transferable, so that it was competent to the executors at any time to have converted it into money. At first I was struck with the difficulty and harshness of compelling executors, who find property of their testator lent out at a higher rate of interest than could be gotten here, to invest it in the 3 per cents. But, on looking at the cases of *Fearns v. Young* and *Howe v. Lord Dartmouth*, and the strong language used by the Lord Chancellor in deciding them, I think myself bound, though the present case is a very hard one, to apply to it the rule which he has laid down. I must say, that these payments to the tenant for life were an improper application of the trust monies.

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It was argued, that, whatever might have been the rule, if the legatee in remainder had applied immediately, what the executors had done could not be considered as a breach of trust, which ought to affect them at this distance of time. But the language of this will is imperative. The executors are expressly directed to convert the personal estate into money, which they are to invest in government or real securities. It is not left to their discretion how they are to act. There is a positive injunction given to them to realize the property. It was the duty of the executors to have sold this debt due from the *East India Company*, and to have invested the money in the 3 per cents.; then the tenant for life would have received only the dividends which the stock so purchased would have produced; and I must, therefore, disallow (though reluctantly) these payments to her, so far as they exceeded the dividends on that amount of 3 per cent. stock.

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The order made was as follows:—“His Lordship held the Plaintiff’s said exception to be good and sufficient, and doth therefore order the same to stand and be allowed: and his Lordship doth order that the said Master do review his said report, as to the said decennial loan. And his Lordship doth declare, that the testator *John Wintersgill Piercy*’s subscription of 2000*l.* to the decennial loan, raised at *Calcutta*, ought to have been sold upon the decease of the testator: and it is ordered that it be referred to the said Master to inquire what sum the said 2000*l.*, subscribed by the testator to the decennial loan, would have sold for, one year after the testator’s death, and what sum of Bank 3*l.* per cent. annuities the money, which the said Master shall find the said 2000*l.* subscribed to the said decennial loan would have sold for, would have purchased,

if

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if the same had been sold by *John Corderoy*, the executor of the said testator, one year after the said testator's death: and it is ordered that the said Master do inquire, how much would have arisen from dividends of such Bank 3l. per cent. annuities, in case the same had been purchased as aforesaid, to the time the said testator's subscription to the said decennial loan was paid off: and his Lordship doth declare, that the Defendants, *Thomas James*, *John Stanbank*, and *William Green*, the executors of *John Corderoy*, the executor of the testator, are entitled to be allowed such sum as the Master shall find would have arisen from dividends of the said Bank 3l. per cent. annuities, as payments on account."

In fact, the 2000l., when paid off by the *East India* Company in 1813, had been invested in the purchase of 3375l. 10s. 6d. 3 per cent. stock, which exceeded by 826l. 17s. 1d. the sum which would have been produced, if the conversion had been made at the end of a year from the testator's death. The Defendants, therefore, insisted before the Master, that, inasmuch as the order of the Master of the Rolls had declared that the subscription to the decennial loan ought to have been sold one year after the decease of the testator, they ought to be charged, in their account of the monies come to the hands of *Corderoy*, only with the stock, and the dividends on the stock, which would have been produced, if the conversion had been then made. The Master was of opinion, that, under the terms of the order of the 19th of *August*, it was not open to him to vary the sums with which he had charged them in his former report; and he certified, that the testator's subscription in the decennial loan, if it had been sold on the 31st of *January* 1803, and the proceeds had been invested in the

the 3*l.* per cents., would have produced 2548*l.* 13*s.* 5*d.* stock, which, down to *April* 1813, (when the subscription was actually sold and the money invested), would have yielded dividends amounting in all to 764*l.* 11*s.* 8*d.* The Master, therefore, allowed to the executors of *Corderoy* this sum of 764*l.* 11*s.* 8*d.*, and deducted, from what he had before allowed them, 1800*l.*, which was the amount of the interest on the decennial loan, which had become due after the death of the testator, and been paid to the widow.

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The representatives of *Corderoy* then presented a petition of appeal from the order of the 19th of *August* 1824, praying a declaration, that, in taking the accounts of the assets of the testator, they ought to be charged with such sums only, in respect of the subscription to the decennial loan, as it would have sold for at the end of a year from the testator's death, and as would have accrued for dividends on the amount of 3*l.* per cent. stock, which the money, arising from the sale, if immediately invested, would have produced.

Mr. *Sugden* and Mr. *Pemberton*, for the appellant.

1827.
Dec. 7.

The Plaintiffs may either adopt what the executors have done, or may repudiate it; they may either take the result of the actual conversion of the stock, or insist on treating the fund as converted at the end of a year from the testator's death. But they cannot adopt the transaction in one part and for one purpose, and reject it in another part and for another purpose: the adoption or rejection must be of the entire transaction. If the Plaintiffs adopt the actual conversion, what claim can they have against the executors? If, on the other hand, they reject it, and choose to treat the property as converted in *January* 1803, the executors are entitled to have

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have whatever benefit resulted from their actual conduct applied in satisfaction of the liability thus thrown upon them. Had the conversion been made in *January* 1803, the Plaintiff would have had 2548*l.* of 3*l.* per cent. stock; the executors, by delaying the conversion, have purchased 3375*l.* of stock. If this delay be made the ground for throwing a heavy burden on the executors, must not the excess of 3375*l.* stock above 2548*l.*, together with the dividends on that excess, be first applied to indemnify them against the consequences of the alleged misconduct which produced such an addition to the fund? It is inconsistent to say, "We shall treat you, as if the money had, in 1803, been called in from the *Indian* security and laid out in stock; and we shall charge you, at the same time, not with the dividends on that stock, but with the interest yielded by the *Indian* security."

Mr. *Horne* and Mr. *Barber*, *contra*.

We do not seek to charge the trustees for breach of duty, in not converting the testator's property in due time. We charge them only with what they have actually received; and the sole question is, as to the propriety of certain payments which they have made; the disputed items of discharge have nothing to do with any of the items of charge. The order of the Master of the Rolls has ascertained that the executors have made some payments improperly; what right can they thereby acquire to apply part of the trust fund in indemnifying themselves against these improper payments? The principle of this appeal is, not that they were right in paying the 200*l.* a year to the tenant for life, but that, having made the payments wrongfully, they should be allowed to indemnify themselves out of the accidental profit which accrued to the trust fund by reason of the delay which took place in the conversion of the assets. A trustee or
 executor

executor can derive no benefit from his own laches or misconduct: every profit which accrues to the fund, accrues for the benefit of the *cestuis que trust*; and the rights of the tenant for life cannot be diminished nor increased by the misconduct of the trustee. How can the tenant for life of a residue, which the testator has directed to be converted into money, and invested in government or real securities, become entitled, as against the remainder-man, to a larger interest in the property, because the trustee has neglected his duty? If the tenant for life was entitled only to the dividends of so much 3l. per cent. stock, as the money laid out in the decennial loan would have purchased, there can be no pretext for saying, that the trustee ought to be allowed the sums which he has paid to her beyond the amount of the dividends on that stock; and how can he be permitted to retain out of the *corpus* of the trust fund, even though the fund has derived an accidental increase from his negligence, payments which he has made by mistake and in his own wrong?

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SCOTT.

The LORD CHANCELLOR.

The case made by the appeal is, that the Plaintiffs seek to charge the executor for a neglect of duty; that, supposing him to have been negligent, he is bound to indemnify the remainder-man against the loss; but that, in consequence of his alleged negligence, the trust fund has increased in value; and though the executor would not be entitled to any advantage from such an increase of the fund, yet that, to the extent of that increase, he would be entitled to indemnify himself for the liability which the suit seeks to throw upon him.

The Plaintiffs present the case to the Court in a very different light. They say that the 10l. per cent. interest
on

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on the decennial loan was actually received by the executor; that he is chargeable with all the sums which he has received; and that, on the other hand, he is entitled to be allowed in his discharge only such sums as he paid away properly. The question therefore is, Whether there is a fixed rule in this court, which defines the amount of the payments which ought to have been made to the tenant for life, and whether that rule be such as the Plaintiffs allege? When a residue is given, as in this will, and a part of it has not been actually converted, are you to consider what the effect would have been, if the fund had been converted? and is the executor to be allowed, in respect of payments to the tenant for life, not the actual income yielded by the property, and paid by him to her, but only such sums as she would have been entitled to receive, if the conversion had taken place in due time? Here, if the fund had been converted, the tenant for life would have received only the dividends of so much 3l. per cent. stock as would have been purchased with the proceeds of the testator's share in the decennial loan: the executor has, in truth, paid to her a much larger sum, out of increased profits which were produced by allowing the money to remain in an *Indian* investment. He has made these payments, it is said, in his own wrong, and cannot be allowed them in his discharge; though, on the other hand, he must be charged with all the sums which he actually received. In that view of the matter, the judgment of the Master of the Rolls would be right; and my present impression is, that I must affirm it. I shall, however, take time to consider, whether, in such a case, when the fund has not been actually converted, and has in consequence of that circumstance yielded a larger annual income, the executor is to be charged with all the sums actually received by him, while the allowances to him, in respect of payments to the tenant for life, are to be measured by

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by the consideration of what she would have received, if the conversion had taken place within a year after the testator's death.

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1828.
April 15.

The LORD CHANCELLOR.

This testator left his property to trustees, who were directed to convert it into money, and to invest the proceeds in government or real securities; and he gave the interest of the money so to be invested to his widow for life, with remainder to the lady who is one of the present Plaintiffs. Part of his property consisted of a sum which he had subscribed to what is called the decennial loan. The trustees did not convert his share of this loan into money; but, suffering it to remain as they found it, paid the interest, which was 10*l.* per cent., to the tenant for life. Was that a proper performance of their duty?

The directions of the will were most distinct; and, according to the case of *Howe v. Lord Dartmouth* (a), and the principles of this Court, it was the duty of the trustees to have sold the property within the usual period after the testator's death. If they neglected to sell it, still, so far as regarded the tenant for life, the property was to be considered as if it had been duly converted. Had the conversion taken place, and the proceeds been invested in that which is considered in this Court as the fit and proper security, namely, 3*l.* per cent. stock, the tenant for life would not have been entitled to more than the interest which would have resulted from such stock. The executor is therefore chargeable with the difference between the interest which the fund, if so converted, would have yielded, and the 10*l.* per cent. which was actually produced by the fund, and was paid over by him to the tenant for life.

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(a) 7 *Ves.* 137.

1828.

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SCOTT.

It is said, that, if the subscription to the decennial loan had been sold, and the produce invested in stock at the end of a year from the testator's death, the sale would have been much less advantageous to the estate than the course which has been actually followed; and that, if the executor is to be charged for not having made the conversion at the proper time, he ought, on the other hand, to have the benefit of the advantage which has accrued from his course of conduct. The answer is this: With respect to the principal sum, at whatever period the subscription to the decennial loan was sold, the estate must have the whole amount of the stock that was bought; and if it was sold at a later period than the rules of the Court require, the executor is not entitled to any accidental advantage thence arising. As to the payments to the tenant for life, the executors are entitled to have credit only for the sums I have adverted to, namely, the dividends on so much 3 $\frac{1}{2}$. per cent. stock as would have been purchased with the proceeds of the subscription to the decennial loan, if the conversion had taken place at the proper time. On the other hand, he is chargeable with the whole of the difference between the amount of those dividends and the amount of the sums which have been received in respect of interest on the money which was continued in the decennial loan. I think, therefore, that the judgment of the Master of the Rolls must be affirmed.

Mr. *Sugden* submitted that the tenant for life was entitled to the actual interest produced by the investment in the decennial loan till the time when it was the duty of the executors to have converted it, namely, till the end of the first year from the testator's death, and therefore that the executors ought to be allowed, in their
accounts,

accounts, the extra interest received in respect of that year.

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Mr. *Horne* admitted that, according to the principle of *Angerstein v. Martin* (a), and *Hewitt v. Morris* (b), the tenant for life was entitled to the income of the residue, not merely from the end of the first year after the testator's death, but from the time of his death. The income, however, during the first year was to be measured in the same way as during any subsequent year, and could therefore amount only, so far as the share in the decennial loan was concerned, to the dividends on the 3*l.* per cent. stock, which, at the end of a year from the testator's death, might have been purchased with the proceeds of that share.

The LORD CHANCELLOR.

During the first year after the testator's death the tenant for life is entitled, not to the interest on the decennial loan, but to the dividends on so much 3*l.* per cent. stock as would have been produced by the conversion of the property at the end of that year.

(a) 1 *Turn. & Russ.* 232.

(b) 1 *Turn. & Russ.* 241.

1825.

1825.

June 15.

1827.

Dec. 11.

NEVINSON v. STABLES.

Petition of rehearing dismissed, because it suggested, as the grounds of rehearing, facts not alleged in the pleadings.

In a suit instituted for the administration of the assets of a testator, who in his will described himself as "of *Halifax* in *Nova Scotia*," certain lapsed shares of the residue were, at the hearing, on further directions, ordered to be distributed according to the statute of distributions, there being no suggestion in the record that the administration ought not to be according to the law of *England*: afterwards, a petition of rehearing was presented, stating, that the testator died domiciled in *Nova Scotia*, and praying, that the distribution might be according to the law of that country: but the petition was dismissed.

GEORGE BRINLEY made his will, dated in *November* 1798, in which he described himself as "of *Halifax*, in the province of *Nova Scotia*, commissary-general and store-keeper general;" and by it he gave the residue of his property to his three sons. Of these, two died in his lifetime. He himself died in 1809, leaving a widow, with a son and daughter, him surviving. The principal part of his property consisted of stock in the *English* funds; and his will was proved in the prerogative court of *Canterbury*.

The bill was filed by the daughter *Mary* and her husband, praying, among other things, a declaration that two third parts of the clear residue of the testator's estate was undisposed of, and ought to be distributed according to the statute of distributions, and that the Plaintiffs were entitled to one third of such clear residue.

William Birch Brinley, the only son of the testator who survived him, died without putting in his answer; and the suit was revived against his widow and personal representative *Joanna Brinley*.

In *August* 1814 a decree was made, directing accounts and inquiries.

On

On the 1st of *March* 1824, the cause was heard on further directions; when a decree was made, declaring that *Joanna Brinley*, as the representative of the son, and the Defendant *Belcher*, as the personal representative of the testator's widow, and the Plaintiffs, were entitled each to one third of that portion of the residue which had lapsed by the death of two of the residuary legatees.

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NEVINSON
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Joanna Brinley now presented a petition, which purported to be a petition of rehearing. It stated that *George Brinley*, at the time of his death, and for forty years previously, had resided in *America*, and was domiciled in *Nova Scotia*; that the residue of his personal estate and effects, undisposed of, ought therefore to be distributed according to the law of *Nova Scotia*; and that, by the law and usages of *Nova Scotia*, the course and order of distribution, after giving to the widow one third part of the residue of the estate of an intestate, gives the remaining two thirds amongst the children, not in equal, but in unequal, shares, the eldest or only son taking a double share, where there are more children than one. It prayed that so much of the decree as contained the above-mentioned declaration might be reversed, and that it might be declared, that the personal estate of *George Brinley*, not disposed of, was divisible according to the law of *Nova Scotia*, and that the petitioner, as the personal representative of the only son of the testator who survived him, was entitled to two thirds of the lapsed shares of the residue.

Sir *Giffin Wilson*, Mr. *Roupell*, and Mr. *Uniacke*, for the petition.

The testator having described himself in his will as "of *Halifax*, in *Nova Scotia*," and the rule being that

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the distribution of the property of intestates must be according to the law of the place in which they are domiciled at the time of their death, the Court ought not to have assumed that the distribution of *George Brinley's* estate was to be made according to the *English* statute, but ought to have directed an inquiry, in order to ascertain the place of his domicile, and the course of distribution which is established there. It will now do what it ought to have done at an earlier stage of the cause. At all events, facts are stated in this petition, which are not contradicted; and if these facts are true, the decree, which has been made, will work great injustice. The Court cannot disregard rights thus clearly placed before its view.

Mr. Horne and Mr. Belt, contra.

This petition, considered as a petition of rehearing, (which it professes to be), is wholly irregular; for it seeks to vary a decree upon the ground of certain allegations, which are not to be found in the pleadings. On a rehearing, those allegations must be disregarded; for the Court can rehear a decree only on the same pleadings and state of facts, on which the decree, so to be reheard, was made. The decree, now impeached, proceeds on the Master's report, in which he finds that certain persons are entitled to certain portions of the residue, according to the statute of distributions. The bill prays expressly that the residue may be divided according to that statute; and there is no suggestion in any of the answers that a different law of distribution should prevail. The circumstance, that a testator, who dies in 1809, describes himself, in a will made eleven years before, as "of *Halifax*, in *Nova Scotia*," is utterly unimportant. If, therefore, the cause were reheard a thousand times, the Court could make

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no other decree than that which it has already made; for a decree, containing any declaration of right different from that already made, would not be according to the pleadings, and would be tainted with manifest error.

1825.
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v.
STABLES.

If a party desires to impeach a decree on the ground of facts not appearing on the pleadings, he can do so only by a bill of review or a bill in the nature of a bill of review; such a bill he cannot file without leave obtained from the Court; and that leave is never given, unless he satisfies the Court, not only of the materiality of the new facts which he desires to introduce into the cause, but that he could not with reasonable diligence have availed himself of them, before the decree was made. If the petitioner is in a condition to take this course, let her present a petition for leave to file a bill of review, or a bill in the nature of a bill of review; if she is not in a condition to do so, she can blame only her own negligence and that of her agents. (a)

LORD GIFFORD, MASTER *of the* ROLLS.

1825.
June 13.

Neither in the bill, nor in the answers, nor in the Master's report, do I find any suggestion that *George Brinley* was domiciled in *Nova Scotia*, or that the law of *England* was not applicable to the distribution of his property. The words, by which he describes himself in the beginning of his will, do not constitute a ground on which I can proceed. On this rehearing I must pronounce, that I cannot alter the decree.

The petition was dismissed with costs.

Joanna

(a) See *Young v. Keighly*, 16 *Ves.* 348. and 15 *Ves.* 557. *Hicks v. Conyers*, 7 *Vin.* 398. pl. 16. *Ludlow v. Macartney*, 4 *Vin.* 409. pl. 18.

1827.

NEVINSON
v.
STABLES.*Joanna Brinley* appealed.*Mr. Heald* and *Mr. Roupell*, for the appeal.

Dec. 11.

Mr. Horne and *Mr. Belt*, *contra*.*The* LORD CHANCELLOR.

The bill sets forth the will, in which the testator is described as of *Halifax*, in *Nova Scotia*, but does not state that he was domiciled there: consistently with the allegations of the bill, he might have been domiciled either there or in *England*. The prayer is, that a part of his property may be distributed according to the statute of distributions. Upon the whole, therefore, the effect of the bill is to represent him as having been domiciled here.

If the fact was not so, it was competent to the Defendant to have set the matter right, by stating in the record that he was domiciled at *Halifax*; but no such case was raised by the answer, or made at the hearing. The Master makes his report, and the cause is heard on further directions; and still there is no suggestion of the alleged facts upon which this petition proceeds.

Under these circumstances, the cause having been finally disposed of in a manner consistent with all that appeared in the pleadings or in evidence, the party cannot now be let in to make a new case.

1827.

WRIGHT v. WARD.

Dec. 14.

THE bill was filed by *William Wright*, the executor of the deceased obligor in a bond. It alleged that *William Wright*, deceased, executed to *Joseph Ward* a bond for securing the sum of 500*l.*, with interest; that *Joseph Ward*, by his last will, bearing date on the 19th of June 1811, bequeathed unto *Robert Chapman* and *Richard Bird* the sum of 500*l.*, upon trust to place out the same upon government or other good security, and to pay the interest thence arising unto his wife *Jane* during her life, and, after her decease, upon trust to pay and dispose of such 500*l.* in the manner therein mentioned, and he appointed *William Ward* and *Robert Ward* to be his executors; that *Joseph Ward's* will, soon after his death, and upwards of fourteen years ago, was duly proved by his executors; that afterwards *William Wright* died, having appointed the Plaintiff his executor; that all interest on the bond was duly paid up to the time of the death of *Joseph Ward*; that, after *Joseph Ward's* death, it was represented and stated to the testator, *William Wright*, by *Joseph Ward's* executors, and by *Robert Chapman* and *Richard Bird*, that they had arranged and agreed to appropriate the 500*l.*, secured by the bond, as and for the aforesaid legacy of 500*l.*, or to that effect; that, in consequence of such communication, and with the privity and approbation of *Robert Chapman*, while he lived, and with the privity and approbation, A testator having bequeathed a legacy to trustees on trust, to invest it on government or good security, and to pay the interest to a woman for life, and, after her death, to distribute the principal among certain persons; the executors and the trustees agreed that a bond-debt of equal amount, which was due to the testator, should be appropriated to the payment of the legacy, and communicated this arrangement to the obligor of the bond, who, for many years, paid the interest to the tenant for life, with the privity of the trustees; afterwards the

surviving trustee of the legacy gave notice to the debtor not to pay the money to the executors, who, on the other hand, commenced an action upon the bond; the debtor having filed a bill of interpleader, the executors demurred; but the demurrer was overruled.

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v.
WARD.

probation, both before and after his death, of *Richard Bird*, and of *Joseph Ward's* executors, the interest, which from time to time after *Joseph Ward's* death, accrued due upon the bond, was by *William Wright*, in his lifetime, and, after his death, by the Plaintiff, paid to *Jane Ward*, up to the month of *April 1826*; that from that time the interest was due, but the Plaintiff was and ever had been ready and willing to pay such interest to *Jane Ward*, or in any other proper manner, and also to pay the sum of 500*l.* in any proper manner, consistent with the Plaintiff's safety; that *Robert Chapman* had been some time dead; that *Robert Ward* claimed to be beneficially interested in the legacy of 500*l.* in reversion expectant upon *Jane Ward's* death; that *Robert Ward* the younger, and *John Ward*, a son of *William Ward*, as well as several children of *Robert Ward*, claimed reversionary beneficial interests in the 500*l.*, and that *William Ward* and *Robert Ward* had lately called upon the Plaintiff to pay to them the principal sum of 500*l.* secured by the bond; that *Richard Bird*, on the contrary, alleging the same to have been well and conclusively appropriated to and in satisfaction of the legacy of 500*l.*, had given the Plaintiff notice not to pay the 500*l.* secured by the bond to the executors or either of them; that the executors had commenced an action upon the bond against the Plaintiff; and that the Plaintiff did not know to whom he could with safety pay the bond, except under the decree of a court of equity.

The prayer was, that the Defendants might interplead, and that the action on the bond might be restrained.

Upon an *ex parte* application, supported by the usual affidavit, the money had been paid into court, and the injunction had issued.

Afterwards,

Afterwards, the executors, *Robert Wgrd* and *William Ward*, filed a general demurrer for want of equity; and that demurrer was allowed by the Vice-Chancellor.

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The Plaintiff appealed.

November.

Mr. *Heald* and Mr. *Knight*, in support of the appeal.

Dec. 14.

A clear case of interpleader is stated on this record. The executors of the obligee have a right to sue at law: and the legatees, or their trustees, have a right to proceed in equity; for the executors and trustees have by their own acts appropriated this bond to the payment of the legacy, and have given notice of that appropriation to the debtor; and he has, for upwards of fourteen years, paid the interest to the tenant for life. There has been what is tantamount to an assignment of the debt upon trust to satisfy the legacy; and whatever claim the trustees or legatees might have on the general assets of the testator, if the bond were to prove insufficient for the payment of their demand, they have a right, as between themselves and the executors, to have this bond-debt applied according to the appropriation of it, which has been so long recognized. Though the obligee is not, in express terms, averred to have been an active party in the arrangement which was entered into, yet notice of it was given to him, and he has acted under it. Whatever may be requisite at law, in equity it is not necessary that the debtor should be a party to a contract for the assignment of his debt. "It has been decided in bankruptcy," says Lord *Eldon* in *Ex parte South* (a), "that, if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shewn to the debtor, it binds him; on the other hand, this doc-

trine

(a) 3 *Swanst.* 593.

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trine has been brought into doubt by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract. (a) That has been the course of their decisions, but is certainly not the doctrine of this Court." If, after the past dealing between the parties, and the notice received from *Bird, Wright* were to pay the money to the executors, and they were to become insolvent, might not the legatees or their trustee file a bill against him in this court to compel him to pay the money over again? The executors have so acted, as to give to a third party a title or colour of title against the debtor; and the collision of the title of the executors with the title or apparent title thus created by their act gives the debtor a right to be protected by injunction against their legal remedies. Even if the Defendant would be safe in paying the debt, when recovered by law, why should he be subjected to the expense of an action, when he is ready to pay his money to the person entitled to it?

The following cases were cited: *Row v. Dawson* (b), *The Duke of Bolton v. Williams* (c), *Angell v. Hadden* (d), *Morgan v. Marsack* (e), *East India Company v. Edwards* (g), *Warrington v. Wheatstone*. (h)

Mr. Sugden and Mr. Norton, for the demurrer.

In all the cases of interpleader which have been referred to, there was an actual assignment. Here it is not pretended that there has been any assignment; nor is any dealing stated, to which an equivalent operation can be

(a) See *Israel v. Douglas*, 1 H. Bl. 259; *Tatlock v. Harris*, 3 T. R. 180.

(b) 1 Ves. sen. 332.

(c) 4 Bro. C. C. 297.

(d) 15 Ves. 244. 16 Ves. 202.

(e) 2 Mer. 107.

(g) 18 Ves. 576.

(h) *Jacob*. 202.

be ascribed. The averment is merely, that the executors of the testator and the trustees of the legacy represented to the debtor that they had arranged and agreed to appropriate the bond debt in payment of the legacy. The Plaintiff does not venture to assert, that any such appropriation was actually made. In fact, it was impossible that such an appropriation could be made; for the parties to this supposed transaction were not competent to enter into any valid arrangement. The trust, which the will imposed on the trustees, was to lay out the 500*l.* on government or good security: to permit it to remain on mere personal security, was a breach of trust; and even if we were to suppose the tenant for life to have acquiesced in what was done, her acquiescence could not bind the infants who have interests in remainder. That which has been done could not be an appropriation, because there has been nothing done, which would bind all parties. Here the *cestuis que trust*, if the obligee of the bond were to become insolvent, might file their bill against their own trustees and the executors, and might compel them to replace the money. Even, therefore, if the arrangement stated in the bill were to have any efficacy, it could not give the Plaintiff a right to control the executors in their legal remedies for the recovery of the debt. Their duty, in any way of stating the case, is, to obtain payment of the money, in order that it may be invested according to the directions of the will, so as to give effect to the supposed appropriation. If any such appropriation has been made, it must be presumed, that the executors are proceeding to enforce payment, with a view to make that appropriation complete. The debtor is not to convert himself into a trustee for the person beneficially interested in the legacy. His duty is, to pay to those in whom the testator has reposed confidence; and against them there is not,

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not, in the present case, the slightest imputation of insolvency, or any suggestion that they mean to misapply the money. The whole system of the administration of assets will be disturbed, if a debtor may thus come into a court of equity to prevent executors from enforcing payment of a debt due to the estate which they represent, on the suggestion that the executors are trustees for third parties.

It is not enough to say that *Bird*, the trustee, might file a bill against the executors and the obligor to have the money applied according to the arrangement which is stated. No such bill has been filed, and the debtor may pay with safety to those who have the legal right. Supposing him to pay the money to the executors, could the trustee compel him in a court of equity to pay it over again? Unless the trustee could do so, there is no pretext for representing that the transactions, stated in this record, constitute a case of interpleader.

The LORD CHANCELLOR.

The only question is, whether, according to the facts stated in the bill, the surviving trustee of the legacy could file and sustain a bill against the obligor of the bond; and my opinion is, that the facts alleged would be sufficient for that purpose.

A legacy of 500*l.* was left to two trustees, for the benefit of certain persons; and there being a debt of exactly that amount, which the executors had a right to claim from the obligor of a bond, an arrangement was entered into between the trustees and executors, by which it was agreed between them, that this debt should be appropriated to the discharge of the legacy. The trustees and executors then go to the obligor of the bond,

bond, and represent to him, that they have entered into this agreement; and, after the communication thus made, he, in the first instance, and then his executor, for a series of years, adopt the arrangement; paying the interest, from time to time, not to the executors, but to the *cestui que trust*, with the consent, privity, and approbation both of the executors and of the trustees. Looking at such a transaction as this, it is impossible to say that there is no ground for the trustees to file and sustain a bill against the obligor; and if they could sustain such a bill, this bill of interpleader must be allowed.

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Nothing turns on the circumstance, that there was not any formal assignment or appropriation in writing. If the creditor enters into such an arrangement as is stated here, and acts upon it, the assignment is complete in equity; and as to the question between the trustee and the *cestui que trust*, it has no substantial bearing on the question. The trustee is, at all events, to have this money in discharge of the legacy.

Order of the Vice-Chancellor reversed, and the demurrer over-ruled.

1827.

Dec. 21. The ATTORNEY-GENERAL v. The Corporation
of WARWICK.

The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corporation, entries in old books of the corporation were not received as evidence against the vicar, to shew that the corporation had from time to time appointed the curate.

THE question in this case was, whether the nomination of the curate and lecturer of the parish of *St. Mary's* belonged to the vicar or to the corporation; and a reference had been directed to the Master, to inquire by whom the appointment had been from time to time made. The Master reported, that the curate had been nominated by the vicar; and the corporation excepted to the report.

To show that the curate had been appointed by the corporation, a series of entries in the old books of the corporation were relied on.

The LORD CHANCELLOR observed, that, according to the decision in *The Mayor of London v. The Mayor of Lynn* (a), private entries in the books of a corporation, which are under their own controul, and to which none but the members of the corporation have access, cannot be made use of to establish rights of the corporation against third parties; and he therefore held, that the entries in the books of the corporation of *Warwick*, which had been referred to in order to show that the curate had been appointed by the corporation, could not be received as evidence to establish their right against the vicar.

(a) 1 *H. Black.* 214. note.

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In the Matter of BRUCE.

Dec. 22.

THE petition was presented by the bankrupt in person ; and he appeared in person to support it. It was signed by him ; and his signature was attested by a person who was not a solicitor, and who did not state himself to be the agent of the petitioner.

A petition presented by the bankrupt in person, and which he appears in person to support, is not within the order of the 12th August 1809.

Mr. *Horne* and Mr. *Rose* objected, that the signature was not attested according to the order of the 12th August 1809.

The LORD CHANCELLOR.

May not a person in every court of justice, if he chooses to waive all professional agency, conduct his case in person? If he is not bound to have an agent in the matter of the petition, he cannot comply with the order. I therefore consider this as a case not provided for by the order.

Objection disallowed.

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ADDENDUM

TO

PAGE v. BROOM.

BESIDES the two ineffectual hearings of this cause, which are mentioned at page 6, it came on, after the alleged defect of parties had been remedied, to be again heard. This third hearing was before Lord *Gifford*; and, in *August* 1827, he pronounced judgment in it: but his death, which happened before the minutes of the decree had been settled, rendered the third hearing equally ineffectual with the former two.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

1827.

BETWEEN

The KING of SPAIN, Don FRANCISCO TACON,
and Don MATEO DE LA SERNA, Plaintiffs; 1827.
June,
Dec. 17. 22.

AND

Don JUSTO DE MACHADO and Others,
Defendants.

THE bill was filed by the King of *Spain* and two persons of the name of *Tacon* and *De la Serna*, described as residing in *London*. After setting forth certain stipulations of treaties, by which *France* became bound to transfer a specified amount of *French rentes* to such person as the King of *Spain* should appoint, for the purpose of being applied to the satisfaction of debts due from *France* to individual *Spanish* subjects, it stated that the *French* government, in pursuance of those treaties, had inscribed a considerable amount of *rentes* in the name of *Machado*, as the agent nominated by the

If, of several Plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their Co-plaintiffs, a general demurrer to the whole bill is a good defence. An instrument, executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different.

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the King of *Spain*; and that, upon the breaking out of a civil war in *Spain*, *Machado* sold the *rentes*, and went with the money to *England*, where he had deposited part of it in the hands of Messrs. *Hullett*, Brothers, and Co. The prayer was, that an account might be taken of the money so deposited with *Hullett*, Brothers, and Co., and that it might be paid into court or to *Tacon* and *De la Serna*.

To connect *Tacon* and *De la Serna* with the suit, the bill stated, that the King of *Spain* had appointed two boards—one, the board of examination and liquidation, and the other the board of appeal—who were to adjudicate on the rights of persons claiming to be entitled, under the treaties, to a share of the monies furnished by *France*; and then it set forth a document, dated on the 11th of *July* 1825, and alleged to be duly executed according to the formalities required by the law of *Spain*. By this instrument, the president and members of the board of examination and liquidation, after reciting a decree of his Catholic Majesty, dated on the 4th of *July* 1825, by which he directed the board to give such powers and instructions as were thereafter contained, “did, by virtue thereof, and of the ample powers and authorities possessed by the said board for performing and executing all matters and things annexed to its commission, with the incidents thereof, and for recovering and securing at its disposition, as the representative of the creditors, the funds assigned to them by the said treaties, give and grant full power and authority, and without any limitation, general and special, so far as by law might be requisite and necessary, unto Don *Francisco Tacon* and Don *Mateo de la Serna*, as such commissioners as aforesaid, jointly and severally, for and in the name of the said royal board, and representing its rights and actions, and those of the president and members thereof, as the representatives

atives of the general body of creditors whereof the liquidation is confided to them, &c., to ask, demand, recover, and receive all and every such funds belonging to the claimants as should or might be in the kingdom of *England*, in the hands, custody, or possession of the government thereof, corporations, establishments, public or private companies, or other persons, &c., but more especially those then being, or which ought to be, in the hands, custody, or possession of Don *Justo José de Machado*, belonging to the said creditors by virtue of the treaties — each of them the said *Tacon* and *De la Serna* proceeding, in respect of the said claims, conformably to such instructions as should be communicated to them by the said royal board; and, on recovery of the funds under and by virtue of such claims, to deposit the same in the Bank of *England*, to be at the disposal of the board as the representative of the said creditors, and in order to the payment of their claims; and for all sums by them so recovered and received, to give and grant all necessary receipts, releases, &c.: and they did thereby further authorise and empower the said attornies and commissioners, if need or occasion should be, to resort to and have recourse to judicial measures according to the laws of this country, by appearing either personally or through the medium of one or more attorney or attornies, whom they were at liberty to nominate, substitute, and support, as often as occasion should require, before all competent judges and tribunals, both supreme and subordinate, so that, in respect of the premises, and every matter and thing thereunto belonging, the said commissioners, Don *Francisco Tacon* and Don *Mateo de la Serna*, were thereby invested with full power and authorities, and the most ample, absolute, and unqualified administration and exoneration; and also with full power and authority to swear, appeal, petition, and do and perform all other necessary acts, matters, and things.”

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 June.

To this bill the Defendants, who were within the jurisdiction, filed a general demurrer for want of equity.

Mr. *Heald*, Mr. *Pepys*, and Mr. *J. Russell*, for the demurrer.

Sir *Charles Wetherell*, Mr. *Shadwell*, and Mr. *Wheatley*, for the bill.

In support of the demurrer it was alleged, that none of the Plaintiffs had such an interest as entitled them to sue in a court of equity for the monies in question; that the King of *Spain*, being a foreign absolute sovereign, was not capable of maintaining a suit in a court of equity here, or at least he was not capable of maintaining a suit for the enforcement of alleged rights, belonging to him only in his royal character; that the bill was objectionable for defect of parties; that, even if the King of *Spain* had such an interest in the funds mentioned in the bill as would have entitled him to sue, yet *Tacon* and *De la Serna* had no interest in them, and that a bill, in which persons, who had no interest in the suit, were conjoined as plaintiffs with a person who had an interest in it, could not be sustained.

Dec. The LORD CHANCELLOR desired that the demurrer might be argued again, by one counsel on each side, merely as to the objection arising from the alleged improper conjunction of Plaintiff.

Dec. 17. Sir *Charles Wetherell*, in support of the bill.

It cannot be assumed on this bill, that *Tacon* and *De la Serna* have no interest in the fund. It is clear that, under the instrument of the 11th of *July* 1825, they are the persons entitled to receive the money, and to give discharges for it; so that, even according to our notions,

notions, they have an interest in the recovery of the money, and a duty to perform, which is connected with the enforcement of the rights asserted by this bill. Part of the prayer is, that large sums may be paid to them. Moreover, that instrument, being executed in *Spain* by *Spanish* parties, must be construed according to the laws of *Spain*; and it would be a bold construction to assume, that, according to the laws of *Spain*, *Tacon* and *De la Serna* are mere attorneys.

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Even if those two persons were merely agents, why should not the principal and the agent concur in suing? By placing the agent on the record, all, who are in any way connected with the matter in question, are brought before the Court; and facilities are afforded for arranging the rights of the parties. It is the usual course to join as Co-plaintiffs the trustee and *cestui que trust*, the assignor and the assignee, the principal and the agent. If *A.*, as the agent of *B.*, contracts with *C.*, *A.* and *B.* may join in a bill for the specific performance of the contract. Nothing is more common than for the auctioneer and the vendor to concur in a bill against the purchaser; yet, in such a case, the auctioneer is merely the agent of the vendor. The analogies of pleading, therefore, are opposed to the subtilty on which this demurrer is supported; and there is no printed authority in its favour, though the state of circumstances, to which it would be applicable, must have been of frequent occurrence.*

Suppose the cause were now at the hearing, would the King of *Spain* be precluded from obtaining such a decree as his evidence would entitle him to, because his agents are joined as Co-plaintiffs? If *A.* and *B.*, stating them-

* The churchwardens may join with a poor person who is chargeable to the parish. 1 *Eq. Ab.* 71. pl. 4. cited from *Mars* 90.

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themselves to be partners, were to file a bill for an account against their agent *C.*, and at the hearing *C.* were to establish by evidence, that *B.* was not a partner with *A.*, but was merely his clerk; who ever supposed that the proof of such a fact would be a defence to the suit, or would protect *C.* from accounting to *A.*? The respective titles of two co-plaintiffs may be inconsistent and adverse; or they may be so connected, that the destruction of the one is the destruction of the other also: but it is no objection to a suit, that the title of one of the Plaintiffs is destroyed, provided there remains on the record a Plaintiff, whose title to relief is consistent with the claim of the other, and is not affected by its failure. *Smith v. Ryan.* (a) Suppose three or four persons, as creditors, file a bill for the administration of an estate, a decree will be pronounced, if one of them establish his demand, though none of the rest succeed in showing that any debt is due to them. Here the claim of *Tucon* and *De la Serna* is not adverse to, but in furtherance of, the claim of the King of *Spain*, and his Catholic Majesty's title to relief remains unimpaired, whether they are held to have title or not.

The proposition of the Defendants is extravagant. They say upon this demurrer, "We admit that the King of *Spain* is entitled to a decree for payment of the money; but he must not have any relief in this suit, because the persons, who are to receive the money, are Co-plaintiffs on the record." What inconvenience or injury do the Defendants sustain by the addition of these Co-plaintiffs? They may be superfluous parties; but mere surplusage does not vitiate. There might, perhaps, be some ground of complaint, if they were persons altogether strangers to the subject of the suit. But, whether they have or not any interest legal or equitable,

(a) 5 *Mad.* 174.

equitable, which would come within the technical definitions of *English* law, they have at least a substantial and close connection with the matters in dispute between the parties.

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Mr. J. Russell, contra.

The instrument of the 11th of *July* 1825 is a mere power of attorney, and conveys no interest, legal or equitable. No words have been pointed out in it, which purport to convey any interest; nor has there been any attempt to describe what is the precise nature of the interest which is supposed to be vested in *Tacon* and *De la Serna*. In fact, that instrument could not by possibility pass an interest; for the parties who executed it — the president and members of the board of examination — were, themselves, merely a judicial tribunal, but had no interest in the fund which was to be the subject of their adjudications. The only question, therefore, is, whether a plaintiff, having an interest in the subject of the suit, can be permitted to conjoin with him, as plaintiffs, persons who have no interest in it?

The first requisite to entitle a man to sustain the character of a plaintiff is, to shew an interest which gives him a right to bring the jurisdiction of the Court into action against the Defendant. If one plaintiff is at liberty to place two or three mere strangers on the record along with him, he may in like manner introduce a hundred into the suit; and, by a proper selection of ages and sexes, may ensure such a series of abatements, by a succession of deaths and marriages, as will enable him to oppress defendants with impunity, and to prevent the suit from ever reaching a stage in which the expense may be made to recoil upon himself. Co-plaintiffs, unlike, in this respect, to defendants, are joined together for better and for worse; the bill is the

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bill not of one of the co-plaintiffs, but of all of them together; the proceedings to be taken are the proceedings, not of one, but of all; the answer of the defendant must be to the interrogatories which they conjointly put: all of them exercise over him all the rights, which, in this Court, a plaintiff has over a defendant; and most important these rights certainly are. Is it to be tolerated, that a mere stranger, because, forsooth, his name is capriciously placed on a record, seeking relief as to a transaction with which he has no concern, shall sift the conscience of a defendant, harass him with exceptions, inspect and take copies of his books and papers? What is a plaintiff without interest more than a plaintiff who is dead?—save only that the former may do mischief to a defendant, whereas the other cannot? Now, if a bill, purporting to be filed by two co-plaintiffs, shewed on the face of it that one of them was dead, it is impossible to say that such a bill could be sustained.

If we look at the particular incongruities and practical inconveniences flowing from such a conjunction of plaintiffs, we shall find, that, in every stage of the cause, it leads to results which jar with the rules and practice of the Court. It is the right of a defendant to file a cross bill, and certain privileges belong to a plaintiff in a cross bill, arising out of the nature of that particular species of suit; a cross bill, however, must bring the same parties before the Court, which are before it in the original suit: *Attorney-General v. Atkinson* (a): by the conjunction, therefore, of immaterial plaintiffs, a defendant is harassed by the necessity of making superfluous defendants—no slight evil in a suit in equity. The death of a co-plaintiff, during the abatement, abates the whole suit: the defendant can take no proceeding; he cannot even file his answer, till the suit is revived; he

(a) 2 *Powder's Eschequer Practice*, 139.

he cannot revive it; and the other co-plaintiffs may not choose to revive, until he takes steps to compel them. Thus he is exposed to the danger of being entangled in litigation longer than he would otherwise have been; of having that litigation rendered more expensive and cumbrous, and perhaps of losing entirely those costs which he might otherwise have obtained. It is a rule of this Court, that a defendant cannot examine a plaintiff as a witness, without the consent of that plaintiff. *Walker v. Wingfield.* (a) Then a plaintiff has only to place a defendant's witnesses on the record along with him, to prevent them from being examined; and, even if the Court, seeing that this was done with a view to defeat justice, were to interfere by any special order, still there is difficulty and expense improperly thrown on the suitor. A plaintiff, who is out of the jurisdiction, is obliged to give security for costs; but he has only to join with him an immaterial co-plaintiff, and he escapes from the rule. All the plaintiffs, who have an interest in the suit, may die, and leave those who have no interest surviving; and then there will be a cause depending in Court, in which not one of the remaining plaintiffs has any interest. These are illustrations of the practical incongruities and inconveniences resulting from the theoretical absurdity of holding that one plaintiff, who has an interest, may place on the record, as co-plaintiffs along with him, other persons having no interest in the suit. The objection would clearly prevail at law; for an action, brought by several co-plaintiffs, cannot be maintained, if it appears that there is one of them, who has not an interest in the action: and, on this point, the principle of pleading must be the same at law and in equity.

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If a record so framed is essentially faulty, how is the objection to be taken? Not by plea; for the objection appears

(a) 15 Ves. 178.

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appears on the bill: not by motion; for it is not upon motion that the Court deals with the proper or improper frame of the pleadings. It is, therefore, by demurrer, and by demurrer alone, that plaintiffs can be stayed from proceeding in a suit so mischievously constituted. If the defendant does not demur, he must suffer all the disadvantages arising from the faulty constitution of the suit.

What would be done with such a suit, if brought to a hearing, it is unnecessary to inquire: because there are many cases, in which, if an objection is not insisted on by plea or demurrer, the benefit of it is lost. If to a bill for an account a defendant answers, but by his answer insists on a stated and settled account as a bar to part of the account, the Plaintiff may amend his bill, charge error in that stated and settled account, and, by proving such errors, open the whole account, at the hearing. But if, instead of insisting by answer on the settled account, the defendant had pleaded it to that part of the account which it includes, and had answered as to the residue, and the plea had been good in form, so as to have been allowed upon argument, the Plaintiff could not afterwards have amended his bill by stating errors in the account so settled, and when he came to a hearing, that part of the account would have been completely barred. *Taylor v. Shaw* (a). If a bill is multifarious, and the Defendant demurs, the bill is out of court; but if he does not demur, the objection cannot be taken at the hearing. *Ward v. Cooke* (b), *Wynne v. Callander* (c).

So the question would stand, if it were untouched by *dicta* or decisions. But there are authorities which bear upon

(a) 2 Sim. & Stu. 12.

(b) 5 Mad. 122.

(c) 1 Russell, 293.

upon it, and all those authorities lead to the same conclusion: for, as often as the subject has been adverted to, the doctrine of the Court with respect to it has been treated as settled; and whenever the point has been distinctly raised, it has met uniformly with the same decision. So far back as 1719, Lord Chancellor *Parker* said, "Though equity go so far as to give either side leave to examine a defendant *de bene esse*, yet this rule has not been extended to a plaintiff, who, if he be an immaterial plaintiff, the defendant may demur." (a) So in *Troughton v. Getley* (b), it was said, and not denied, "that, if a plaintiff was an immaterial party, the defendant might demur." The question has been twice decided by Sir *John Leach*, when Vice-Chancellor. In *Cuff v. Plattell* (c) a general demurrer was allowed expressly on the ground that, though one of two plaintiffs had an interest in the subject of the suit, the other had no interest in it. In *Makepeace v. Haythorne* (d) a defendant pleaded in bar to a bill for an account, that one of the plaintiffs was an uncertificated bankrupt; and, though the other plaintiff had such an interest as would have sustained the suit, if he had sued alone, and though the persons named in the plea as assignees of the bankrupt plaintiff were already defendants in respect of some of the transactions stated in the pleadings, so that nothing could turn on any alleged want of parties (even if the plea had taken such an objection—which it did not do), the Vice-Chancellor allowed the plea expressly upon the ground, that one of the plaintiffs had no interest in the subject-matter of the suit.

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In no one of the instances which have been referred to in support of the bill, is a party placed as a Plaintiff on the record, who has no interest, either legal or equitable,

(a) 1 *P. Wms.* 596.

(b) 1 *Dick.* 382.

(c) See *infra*, page 242.

(d) See *infra*, page 244.

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table, in the matter of the suit. It is true, for instance, that an auctioneer is often joined as a plaintiff with the vendor in a bill against the purchaser; but the auctioneer has an interest in the contract, and might bring an action upon it; and he has an interest also in being protected from the legal liability, which he might incur in an action brought by the purchaser to recover the deposit. The assignor and the assignee sue together, because the one has the legal, the other the equitable interest. *Smith v. Ryan* (a) was simply a case of that kind.

Sir Charles Wetherell, in reply.

Dec. 22.

The LORD CHANCELLOR.

This is a bill filed in the name of the King of *Spain* and Don *Francisco Tacon* and Don *Mateo de la Serna*, against Don *Justo de Machado*, and *John Hullett* and *Charles Widder*. The object of the bill is to obtain an account of certain monies which are alleged to have come into the possession of the Defendants. The facts of the case stated by the bill, as far as it is necessary to mention them for the purpose of the present question, are the following: —

By virtue of a convention entered into between the governments of *France* and *Spain*, the government of *France* engaged to appropriate a large sum of money, for the purpose of being applied in the liquidation of certain claims, which subjects of the King of *Spain* had on the *French* government, in consequence of events that had taken place during the period when the troops of *France* occupied that country. The stipulation was, not that money was to be paid in the first instance, but

(a) 3 *Mad.* 174.

that

that a certain quantity of *French rentes* were to be inscribed in the great book of the debt of *France*, and that inscription was to be in the name of such persons as the King of *Spain* should appoint. The person, originally appointed for that purpose, was an individual of the name of *Noguera*, who was then consul-general of *Spain* in the kingdom of *France*. In pursuance of the convention, the government of *France* inscribed a portion of those *rentes* in the great book, in the name of *Noguera*. But, before the transaction was completed, *Noguera* was removed, and, one of the Defendants, *Machado*, being appointed consul in his stead, *Noguera* transferred to him the *rentes* which had originally been inscribed in the name of him, *Noguera*; and the inscription of the balance of *rentes* in the great book was made in the name of *Machado*. Soon after this transaction, a civil war broke out in *Spain*; and *Machado*, being apprehensive that this property might in some way or other be divested out of him, sold the *rentes*, and came to this country with the proceeds of the sale. After he had been some time here, he assigned or transferred to Messrs. *Hullett*, Brothers, and Co., or deposited with them, a part of this money, and he afterwards went to the *Netherlands*, where he was residing at the time when the bill was filed. After an arrangement had been concluded between the kingdoms of *France* and *Spain*, and the civil war had been brought to an end, applications were made, on the part of the government of *Spain*, to *Machado*, to pay over the money to them, or deposit it in the Bank of *England*. These applications were made to him by one of the secretaries of state of the *Spanish* government, and also by two persons, the presidents of two tribunals which had been constituted — the one, for the purpose of examining the claims of the *Spanish* subjects on this fund — and the other, as a tribunal of appeal. In consequence of instructions which these two presi-

dents

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dents had received from the King of *Spain*, they appointed particular persons as their commissioners or agents, for the purpose of collecting and receiving this money; and the persons, who were so appointed for that purpose, are the two Plaintiffs *Tacon* and *De la Serna*. *Tacon* and *De la Serna* came over to this country; and the bill was filed against the partners in the house of *Hullett*, Brothers, and Co., and against *Machado*, in the joint names of the King of *Spain*, *Tacon*, and *De la Serna*.

To this bill a general demurrer was filed, and various points were argued on that demurrer.

One point, which was argued on that demurrer, and which was spoken to a second time, was, that *Tacon* and *De la Serna* have no interest in this property, so as to entitle them to sue for it in this Court; and if they have no interest in this property, that then the circumstance of their being joined as Plaintiffs on the record with the King of *Spain*, (assuming that the King of *Spain* has such an interest as would entitle him alone to sustain a suit), is a good ground of demurrer.

The first question, therefore, is, Whether *Tacon* and *De la Serna* have any interest in the subject-matter of this suit. The two boards — the board of examination and liquidation, and the board of appeal — were constituted for the purpose of ascertaining who were the individual subjects of *Spain* that had claims on the fund; they were tribunals constituted for the purpose of adjudication. After the fund had been collected and deposited, they were to issue certificates of their adjudications; and the persons, holding those certificates, were to be entitled, on application to the King of *Spain*, or to the persons appointed by him, to receive a proportion

tion of the fund corresponding with those certificates. In consequence of the difficulties which were thrown in the way of obtaining the money from *Machado*, the King of *Spain* authorized these two tribunals to appoint commissioners, for the purpose of endeavouring to get it into their hands: and these commissioners were appointed by an instrument which is set out on this record. On looking at that instrument, it appears, on the construction of it, to be a mere power of attorney: it is, in its form, very similar to an *English* power of attorney; it gives *Tacon* and *De la Serna* power to sue, to demand, to receive, and give acquittances, and, upon receipt or recovery of the money, to deposit it in the Bank of *England*, or to secure it in any other mode. Construing this instrument according to the obvious import of its terms, as it is set out in the bill, I do not think that it conveys any interest whatever to *Tacon* and *De la Serna*; it is merely an authority to them to act as attorneys for the persons whom they represent.

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It was suggested, in the course of the argument, that it was difficult for us to be quite sure as to the construction of this instrument; for it was an instrument executed in *Spain*, and was therefore to be construed according to the laws of *Spain*. The answer is obvious. The instrument is set out on the record, and we must construe that instrument according to the natural import of its terms. If it is to have a peculiar sense and construction, arising out of the laws of *Spain*, it was incumbent on those who contend that such a construction should be given to it, to have made a statement to that effect on the face of the bill. There being no such allegation, I must construe the instrument according to its obvious import; and, after having perused it repeatedly with as much attention and care as I could give to it, I think that it is a mere power of attorney, authorising
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Tacon and De la Serna to collect the money, and to sue for it in the name of their principal.

That being so, there are on this record, conjoined as Plaintiffs with the King of *Spain*, who has an interest in the suit, two persons who have no interest, and who, if they are to sue, ought to sue, not in their own names, but in the names of those from whom they derive their authority. Is this, or is it not, a ground of general demurrer?

If a party, having an interest, could join with himself, on the same record, a party not having any interest, and no advantage of that could be taken, either by plea or general demurrer, it would be productive of great and obvious inconvenience. But it is not necessary for me to reason on the general principles applicable to the question, or to point out the inconveniences which would ensue, if such an objection were not a ground of general demurrer; because the point has been decided in two distinct and precise cases, by the present Master of the Rolls.

In a case of *Cuff v. Platell*, which was decided in 1822, a person of the name of *Lincoln* fell into embarrassments, and an arrangement was made that he should assign his property for the benefit of his creditors. An assignment was prepared, and the two trustees, to whom the assignment was to be made, were *Cuff* and a person of the name of *Griffith*. The assignment never took effect: but the Defendant *Platell*, by the directions of *Cuff* and *Griffith*, the intended trustees, took possession of the property of the insolvent, and sold it. Afterwards, a commission of bankrupt was issued against *Lincoln*; and, *Cuff* being appointed assignee of his estate, *Cuff* and *Griffith* joined in filing a bill against *Platell* for the produce of the property he had sold. A general demurrer was filed; and, on argument,

argument, (though that point was not made at the bar), the Vice-Chancellor observed, that it appeared by the bill that the assignment did not take effect; that *Griffith*, therefore, had no interest in the subject-matter of the suit, and, *Griffith* having no interest, he had no right to sue in conjunction with *Cuff*; and he was of opinion, on that ground, that the demurrer ought to be allowed.

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The question came again before the same learned Judge, in the case of *Makepeace v. Haythorne*, in 1827. In that case, the objection did not appear on the face of the bill: the Defendant, therefore, brought it forward by plea. The judgment of Sir *John Leach* was in these terms: — “The single question is, if one plaintiff has no interest in the matters of the suit, and the others alone have an interest, does such a conjunction of parties make the bill demurrable, or expose it to be met by a plea? On consideration, I entertain the same opinion I expressed on the argument. I am clearly of opinion, that, if a party, having an interest, joins with him, as a co-plaintiff, a party having no interest, the bill is demurrable, if that fact appears on the bill: if the fact does not appear on the bill, but is brought forward by plea, such a plea is a good defence to the suit. I am of opinion, therefore, that this plea must be allowed.”

On the authority of these two decisions, I am of opinion that the present demurrer ought to be allowed; it depending entirely on the question, Whether or not, on the construction of the instrument set out in the bill, *Tacon* and *De la Serna* have any interest in the monies which are the subject of the suit. That instrument, in my opinion, does not convey any interest to them; and the bill, in its present form, cannot be sustained.

Demurrer allowed.

1822.

Nov. 2.

CUFF v. PLATELL,

A general demurrer for want of equity allowed, where it appeared on the face of the bill, that, of two co-plaintiffs, one had not any interest in the matters of the suit.

A PERSON of the name of *Lincoln* being in embarrassed circumstances, an agreement was entered into that his property should be assigned to *Cuff* and *Griffith* in trust for his creditors. For this purpose a deed of trust was prepared; and *Cuff* and *Griffith*, acting as trustees, though from the statement in the bill it was apparent that the intended deed of trust never had any operation as a valid instrument, took possession of the property of *Lincoln*, and sold part of it. In making the sales, they employed the Defendant *Platell* as their agent, and he received and still retained the proceeds. Afterwards a commission of bankrupt issued against *Lincoln*, under which he was declared a bankrupt; and two assignees were elected, of whom *Cuff* was the survivor. The bill was filed by *Cuff* and *Griffith*; and, after stating in detail the transactions above referred to, prayed that *Platell* might account for the monies received by him, arising from the sale of *Lincoln's* effects, and that he might deliver up the title-deeds of certain real estates of *Lincoln* which had come into his hands.

Platell demurred to the bill for want of equity.

Mr. *Roupell*, in support of the demurrer, contended, that this was merely a bill for money had and received to the use of the Plaintiffs, and that their remedy was at law and not in equity.

Mr. *Barber*, *contra*, argued, that the money had come into the hands of *Platell* as the agent of *Cuff* and *Griffith*,

fit, and that a principal had always a right to make his agent account in a court of equity.

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Sir JOHN LEACH, VICE-CHANCELLOR.

Cuff alone would have had a clear right to sustain this bill against *Platell*. But the intended deed of trust never took effect; and *Griffith*, therefore, has no interest in the matters in litigation. The question then is, Can a plaintiff join with him, as a co-plaintiff, a person who has no interest in the matters in litigation?

Mr. *Barber* argued, first, that, according to the statement in the bill, *Griffith* had or might have an interest in the suit; and, secondly, that, if he had no interest, the bill would be sustained by the interest which was in *Cuff*.

The VICE-CHANCELLOR held, that the bill did not shew any interest in *Griffith*; and that a plaintiff, having an interest, could not join with him, as a co-plaintiff, a person having no interest in the matters of the suit.

Mr. *Barber* suggested, that many such bills had been filed.

The Vice-Chancellor gave him permission to mention the point again, if he could find any authority for such a conjunction of plaintiffs.

On a subsequent day, Mr. *Barber* stated, that he had not been able to find any authority on the subject; and the demurrer was ordered to be allowed.

1827.

April.

MAKEPEACE v. HAYTHORNE.

A plea, shewing that one of two Plaintiffs has no interest in the matters of the suit, is a good defence to the whole bill.

THE bill was filed by *Henry Makepeace*, and by *James Small* on behalf of himself and the other creditors of two partnerships, which had traded under the firms of *Clarke* and *Makepeace*, and *Clarke* and *Makepeace*.

The bill stated that the Plaintiff *Henry Makepeace* and *John Clarke* the younger entered, in 1817, into partnership with *John Clarke* the elder; that, in *July* 1819, *John Clarke* the elder died, having, by his will, devised his freehold messuages, workshops, and premises unto *Haythorne*, *John Clarke* the younger, and *Latcham*, upon trust to permit and suffer his partners, *John Clarke* the younger and *Henry Makepeace*, to continue in possession of his warehouse and other premises at a yearly rent; that the executors proved the will; that, in *September* 1821, an agreement was entered into, under which the partnership was carried on between *John Clarke* the younger and *Henry Makepeace*; that, in *May* 1824, *John Clarke* the younger, with a view to exclude *Henry Makepeace* from the business, and to appropriate it to himself, caused a distress to be levied on the partnership premises, under which *John Russ Grant* was put into possession of the partnership property; that *John Russ Grant* had from that time continued in the possession and management of it; that, in *June* 1824, *John Clarke* the younger died, having appointed *Haythorne* and *Latcham* his executors; that the Plaintiff *Small* was a creditor of both partnerships; and that certain sums were due to *Makepeace* from the estate of *Clarke* the elder.

elder. The material part of the prayer was, that the rights and interests of *Makepeace* in the partnerships might be declared and ascertained, and that the estates of the *Clarks* might be applied in a due course of administration.

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John Russ Grant was a Defendant.

To this bill the Defendants *Haythorne* and *Latcham* put in a plea, in bar to the whole of the discovery and relief. The plea, after the usual averments with respect to the trading, the petitioning creditor's debt, the act of bankruptcy, and the issuing of the commission, stated, that, in *June 1824*, *Henry Makepeace* had been declared a bankrupt; that his estate and effects had been assigned to *John Russ Grant*, who had been duly chosen assignee; and that *Henry Makepeace* had from that time been and still was an uncertificated bankrupt.

Mr. Wakefield supported the plea on the ground, that it stated matter which shewed that the Plaintiff *Makepeace* had no interest, in respect of which he could sue; and he argued that a bill could not be sustained, unless each and every one of the Plaintiffs had some interest, legal or equitable, in the matters of the suit.

Mr. Heald and *Mr. Koe*, *contrâ*.

The averments of the plea shew only that *Makepeace* could not have been sole Plaintiff. But the Co-plaintiff *Small* has a title to relief, which is in no degree affected by the averments of the plea. How, then, can a plea be good, which meets only a part of the case stated by the Plaintiffs? This plea, if worth any thing, should have been limited to so much of the bill as related to the relief prayed by or for *Makepeace*.

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There is no authority for the position, that a bill cannot be sustained, unless each and every of the Plaintiffs has an interest in the matters of the suit. It is enough that there be clearly such an interest in the Plaintiffs, some or one of them, as will give to all, or some or one of them, a title to equitable relief against the Defendants.

The VICE-CHANCELLOR ordered the further argument to stand over, in order that counsel might search for authorities ; stating, at the same time, that he had some recollection of having, on a former occasion, decided, that, if one of several co-plaintiffs had no interest in the suit, the bill could not be sustained.

The plea was again mentioned, but no authorities were produced.

Sir JOHN LEACH, on the last day on which he sat as Vice-Chancellor, delivered the following judgment : —

This is a bill for an account, filed by two complainants. The Defendant has pleaded in bar, that one of these two Co-plaintiffs is an uncertificated bankrupt. The fact of bankruptcy being established for the purpose of the argument of the plea, it is clear, that, of the two Co-plaintiffs, there is one who has no interest in the matters of the suit; and the Defendant insists, that the conjunction of a plaintiff not having an interest with a plaintiff who has an interest, is fatal to the bill. The single question then, is, If one plaintiff has no interest in the matters of the suit, and the others alone have an interest, does such a conjunction of parties make the bill demurrable, or expose it to be met by a plea ?

On

On consideration, I entertain the same opinion I expressed on the argument. I am clearly of opinion, that, if a party, having an interest, joins with him, as a co-plaintiff, a party having no interest, the bill is demurrable, if that fact appears on the bill; if the fact does not appear on the bill, but is brought forward by plea, such a plea is a good defence to the suit. I am of opinion, therefore, that this plea must be allowed.

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NEROT *v.* BURNAND.

July 20, 21.
December 22.

JOHN NEROT, while carrying on business as an hotel-keeper, in a messuage situate in *King Street*, known by the name of *Nerot's Hotel*, made his will, dated on the 30th of *January* 1798, whereby, after declaring it to be his intention to assign unto *John Dax*, the messuage and hotel for the remainder of his term therein, together with all his effects in or about the same, and the business carried on in it, in trust for the benefit of his son and daughter, *James Nerot* and *Mary Nerot*, subject to their paying unto him an annuity to be agreed upon between them for his life, he, the testator, bequeathed unto his son, his daughter, and *John Dax*, 10*l.* each; and, as to all the residue and remainder of his personal estate and effects, except the hotel, and the plate, furniture, and effects in and about it, he gave the same unto his daughter and son in equal shares; and he appointed

Where a partnership is dissolved, and, after the dissolution, one of the partners, without the consent of the other, continues in possession of the partnership effects, and carries on the same business on the same premises, in the course of which the specific effects that belonged to the partnership are, in whole or in part, consumed, and

replaced by others; the effects, which are found on the premises, and with which the business is carried on at the date of a decree, declaring the partnership to have been dissolved before the institution of the suit, are not to be treated as property of the partnership.

Evidence of the existence of a partnership.

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v.

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appointed his daughter *Mary Nerot*, and *John Dax*, his executrix and executor.

The testator died in *May* 1804, without having executed any such assignment as was referred to in his will, and leaving his son and daughter his only next of kin.

The daughter alone proved the will. After the death of her father, Miss *Nerot* continued to carry on the business in her own name, on the same premises, and in the same manner, as it had been conducted previously. In the beginning of 1810, the lease of the premises in *King Street* being about to expire, she transferred the business to a house in *Clifford Street*, which was purchased by her in her own name, and conveyed to her in fee; and there the concern was managed, in the same manner as before, until the 16th of *September* 1819, when she intermarried with the Defendant *George Burnand*. By a settlement made in contemplation of the marriage, and dated the 21st of *August* 1819, the hotel and the effects in and about it were conveyed and assigned to *Flexney*, on trust to sell the same, and to stand possessed of the proceeds, when invested in the public funds, upon certain trusts for the benefit of the husband and wife, and the issue of the marriage.

On the 12th of *January* 1820, *James Nerot*, who, from the year 1808, had been almost constantly resident on the Continent, filed his bill against Mr. and Mrs. *Burnand*, alleging that the business had been carried on by his sister for the equal benefit of himself and her, and with the effects of the testator; that the house in *Clifford Street* had been purchased without the concurrence of the Plaintiff, but had been paid for with money arising from the assets of the testator or from the profits of the business; that the business carried
on

on in *Clifford Street* was a continuation of the business before carried on in *King Street*; that *Mary Nerot* had from time to time advised with him as to the management of the concern; that she had received monies from him for the purpose of being employed in it, and made payments to him on account of the profits; and that the co-partnership, which had thus subsisted, ceased upon her marriage. The prayer was, that the settlement of the 21st of *August* 1819 might be declared void as against the Plaintiff; that the partnership might be declared to have ceased on the marriage, or might be decreed to be now dissolved; that the premises in *Clifford Street*, with the good-will of the trade and effects in and about the house, might be sold; that the accounts of the partnership might be taken; and that the balance, which should be found due to the Plaintiff, might be decreed to be paid to him by Mr. and Mrs. *Burnand*, or out of their moiety of the monies to arise from the sale of the partnership property.

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The Defendants, *George Burnand* and *Mary* his wife, by their answer stated, that *Mary Burnand* and the Plaintiff, soon after their father's death, caused an inventory of his property to be made, and had several meetings to determine on the mode of disposing of it; that it was at length agreed that the household furniture, plate, and linen, with the lease of the hotel, and the good-will of the trade, should be valued, and that she, *Mary Burnand*, should become the purchaser of the Plaintiff's moiety at such valuation; that, in *June* 1804, the valuation was accordingly made, and amounted to the sum of 2366*l.*; that she, in pursuance of the agreement, had paid to her brother, or for his use, at various times, monies to the amount of 1183*l.*, being the moiety of such valuation; and that she had, at different times, paid to him other sums of money, and to an amount exceeding his proportion of the testator's residuary

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duary estate; that, the Defendant *Mary* having thus become the sole owner of the hotel, advertisements, drawn up by the Plaintiff himself, were circulated with his privity, in which the hotel was described as "having now become her property," and in which she was mentioned as the only person interested in the business; that the premises in *Clifford Street* had been purchased with her own monies, or with monies borrowed and since repaid by her; that the trade had always been carried on for her own sole and exclusive benefit; that all the dealings and accounts of the concern were in her own name; that on no occasion had the money or the credit of the Plaintiff been employed in it; that he had never attempted to interfere in it as a partner; that his advice had never been asked in respect of it, except in so far as she might have communicated with him as her brother, concerning incidental occurrences; that she had never received monies from him for the purpose of being employed in the business; and that she had never made any payment to him on account of profits; but that she had frequently advanced to him considerable sums, for which he was still her debtor.

The principal witness on behalf of the Plaintiff was *Joseph Cary*, partner in a house, who had been the commercial agents of the Plaintiff. He stated, that the Defendant *Mary*, in many conversations which she had with him in 1805, 1806, and 1807, declared, "that all consideration of a valuation or agreement for the purchase of the good-will, stock in trade, and property of the hotel, was abrogated and at an end, in consequence of her inability to pay for the Plaintiff's share; that, in 1805, 1806, and 1816, he, on behalf of the Plaintiff, inspected the books of the concern, and, on these occasions, the Defendant, *Mary*, said, that she was carrying on the business for the joint benefit of herself and the Plaintiff; that, on inspecting the books and
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accounts in 1805, he found a great deal of irregularity and confusion in them, and particularly that receipts of sums to a considerable amount had been omitted to be inserted; and that she promised to keep the accounts more regularly in future; that, on his examining the books in 1806, he found that they were kept with more regularity; but, as to the sums omitted to be inserted in the accounts of the preceding year, she maintained that she could not give any better explanation, but that she had not made any private purse out of the concern, and she promised to continue to keep, in future, more regular accounts than those kept in her father's lifetime; that he, *Cary*, told her, that his motive for inspecting and examining the books was, to take some account of the property, money, and effects which she was in possession of, as executrix under the will of her father, and that the Plaintiff might know how the hotel trade was going on, and how the accounts of the concern were kept."

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This witness also stated, that the Defendant *Mary* had frequently applied to him, as the agent of her brother, for advances of money to be employed in the business; and that, in *January* 1809, and *February* and *March* 1810, he, on the Plaintiff's account, advanced to her the sums of 160*l.*, 400*l.*, and 100*l.*, for the purpose of paying part of the purchase-money of the premises in *Clifford Street*, and of repairing and fitting them up; and that he and his partners had furnished wines for the hotel, with which they had debited the Plaintiff.

The evidence on the part of the Defendants was intended to show, that the Plaintiff had entered into an agreement, as stated in their answer, to sell his interest in the hotel and business to his sister, or to prove circumstances from which such an agreement was to be inferred; and they relied strongly on a letter from the Plaintiff to his sister, dated at *Paris*, the 16th of *August* 1810,

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1810, in which he appeared to treat the hotel and the business as if he had no interest therein.

To explain the latter circumstance, the Plaintiff proved, that, "at the time of writing the letter, he was in France, under his Majesty's licence, for the purpose of recovering and shipping *British* property for *England*; that any intimation on his part of his being connected with *England*, or having property there, would have been attended with personal danger; that all his property in *England* was conveyed to other persons, so as to have the appearance of belonging to them, and that all letters written by him, while he was abroad, were so worded, as to prevent the functionaries of the *French* government from knowing that he had any concerns or property in *England*."

During the suit, Mr. and Mrs. *Burnand* remained in possession of the hotel, and continued to carry on the business in the usual manner.

On the 5th of *March* 1824, the cause came on to be heard before the Vice-Chancellor; and by the decree then made, it was ordered, among other things, that the parties should proceed to a trial of the following issue: "Whether there was, in the year 1804, an agreement for sale by the Plaintiff to the Defendant, *Mary Burnand*, of his share and interest in the good-will, lease, stock in trade, and other property and effects in the pleadings mentioned."

The issue was tried in the Court of Common Pleas on the 6th of *December* 1824, when the jury gave a verdict for the Plaintiff, finding that there was not any such agreement.

On the 23d of *April* 1825, the cause was heard before the Vice-Chancellor upon further directions: when the Court

Court declared, "that the hotel business carried on in *King Street* and in *Clifford Street*, under the designation of *Nerot's* hotel, from the death of *John Nerot*, until the 16th day of *September* 1819, was carried on by the Defendant *Mary* in copartnership with *James Nerot*, in equal shares, and that such partnership was dissolved on the 16th day of *September* 1819; and that the freehold messuage in *Clifford Street*, and all the household goods and furniture, plate, linen, china, and wines, stock in trade, implements, and other effects, being in or about the premises, formed a part of the copartnership property;" and it was ordered that the said freehold hereditaments and the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects, in and about the premises, should be sold. Directions were also given for taking the accounts of the personal estate of the testator, and of the partnership dealings.

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From this decree, Mr. and Mrs. *Burnand* appealed.

The appeal was argued before Lord *Eldon*; but no judgment had been given, when his Lordship resigned the Great Seal.

The case was again heard before Lord *Lyndhurst*. July 30, 21.

Mr. *Horne* and Mr. *Roupell*, for the appellants.

Mr. *Heald* and Mr. *Barber*, for the respondent.

The topics principally relied on by the appellants were, that, if any partnership existed between the brother and sister, it must have been constituted by an agreement entered into after the father's death; that there was no evidence of any such agreement, nor was any date assigned, to which it was to be referred; that the finding of the jury

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jury on the issue only negated the allegation, that the Plaintiff's moiety of the hotel, and of the effects in and about it, and of the good-will of the business, had been purchased by the Defendant at a fixed sum: but that, though the brother was entitled to a moiety of the effects, with which the executrix, having also the beneficial interest in the other moiety, had carried on the business, he did not thereby become a partner in the trade; that there was a total absence of all those circumstances, which, in the natural course of things, would have accompanied the existence of a partnership, while, on the other hand, many of the admitted facts, and, more especially, the conduct of the Plaintiff himself, were not reconcilable with the hypothesis that a partnership had actually existed; that the communications and dealings of the Defendant *Mary* with *Cary* did not constitute such a train of proceedings as would have taken place during a partnership of fifteen years' continuance, and could all be explained by the partial interest which the Plaintiff might claim in a business, on which, and on the property involved in it, he had a demand for his share of so much of the assets of his father as had been employed in carrying it on; that, after the lapse of so many years, no reliance could be placed on the evidence of a single witness, as to expressions alleged to have been used by the Defendant in 1805, 1806, and 1809; and that *Cary's* evidence was not corroborated by the circumstances of the case, was directly contradicted by the solemn oath of the Defendant, and was discredited by the tenor of the Plaintiff's own letter.

It was further insisted, that, at all events, the house in *Clifford Street* could not be treated as partnership property. The Defendant *Mary* had alone contracted for it; she paid for it; the conveyance was made to her; the Plaintiff had not been consulted in any part of the transaction, and could not have been compelled to adopt the purchase.

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Even if a partnership had subsisted in the business previously carried on in the leasehold premises in *King Street*, the purchase of freehold hereditaments was not a transaction in the usual course of the dealings of such a partnership; and if freehold hereditaments, bought by, and conveyed to, one of the partners, were afterwards used for partnership purposes, the partnership became not the owner, but merely the tenant, of the premises. Besides, the issue of the marriage (if there should be any) would be purchasers for a valuable consideration, and would have a right to have the trusts of Mr. and Mrs. *Burnand*'s marriage settlement executed in their favour.

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It was also argued, that the decree of the Vice-Chancellor was inconsistent, in so far as it declared that the partnership ceased on the 16th of *September* 1819, and yet treated all the effects, which were on the premises at the date of the decree in *April* 1825, as partnership property.

The LORD CHANCELLOR.

Dec. 22.

In 1798, a person of the name of *Nerot*, who kept an hotel in *King Street*, *St. James's*, being then in the occupation of this property, made his will, by which he bequeathed the residue of his personal estate to his son *James Nerot*, the Plaintiff, who at that time was about twenty years of age, and to his daughter *Mary Burnand*, then *Nerot*, who was living upon the premises with her father, and whom he also appointed his executrix. In his will he declared that it was his intention to assign his interest in the house in *King Street*, together with the effects in it, and the business, to a trustee, for the benefit of his son and daughter. No such assignment, however, was ever in point of fact made; and, in 1804, the testator died. *Mary Burnand* had, up to the period
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of her father's death, managed and conducted this business. After his death, she continued to conduct the business as before; and, as executrix, she took possession of his assets, and, among the rest, of this property, though it was excepted in the will. There can be no doubt that *Mary Burnand* and *Mr. Nerot*, who were the only children of the testator, were entitled jointly to this property at the time of his death. Upon this point there is no dispute.

The business was carried on by *Miss Nerot*, upon the premises in *King Street*, till the year 1809 or 1810. *Mr. Nerot* was frequently absent from this country, in consequence of his carrying on business of some description in *France*. In the year 1809, the lease of the house in *King Street* being upon the point of expiring, a negotiation was opened by *Miss Nerot* for purchasing a house in *Clifford Street*, with the view of transferring the business thither. During the course of that negotiation, she made an application to a person of the name of *Cary*, who acted in this country as the agent of *Mr. Nerot*, for an advance of money on *Mr. Nerot's* account: he demurred for a considerable time, but, at last, he offered to advance 400*l*. In the mean time money had been procured in other quarters; and, the house having been purchased by *Miss Nerot*, the business ultimately was transferred to the premises in *Clifford Street*. From 1810 till the month of *September* 1819, the business was carried on by *Miss Nerot*, in *Clifford Street*.

In *September* 1819, *Mr. Nerot* being then absent upon the Continent, *Miss Nerot* married the other Defendant, *Mr. Burnand*. As soon as *Mr. Nerot* obtained information of this, he was dissatisfied with the marriage, and declared the partnership between him and his sister dissolved. No delay whatever seems to have taken

taken place in his determination to act upon the marriage as a dissolution of the partnership; for, in *Hilary* term 1820, he filed the present bill, for the purpose of obtaining a declaration that the partnership was at an end from the period of the marriage, or a decree that it should be dissolved by the order of the Court, and for an account generally in the usual form. The defence, set up by the answer, was of this nature:—That, shortly after the death of Mr. *Nerot* the elder, an agreement had been come to between *James Nerot*, the son, who deemed it inconsistent with his views in life to be concerned in this business, and his sister, that the property should be valued, and that half the value of the property should be paid to the Plaintiff. The Vice-Chancellor directed an issue, for the purpose of trying the fact, as to whether or not such an agreement had been entered into. That issue was tried before the Chief Justice of the Common Pleas: and, upon the trial, Mr. *Nerot*, Mrs. *Burnand*, a person of the name of *Cary*, and others, were examined as witnesses. The jury were of opinion that no such agreement had been entered into, and they found a verdict for Mr. *Nerot* on that issue. The Chief Justice and the jury seem to have been of opinion, that a partnership existed between these parties. Lord *Eldon* has observed, and justly observed, that the Chief Justice and the jury had nothing to do with the question of partnership; and whatever impression may have been made on their mind with respect to the question of partnership, as they had no right to decide that question, I must dismiss entirely from my consideration, although all the parties were examined before them, the impression made upon their minds as to that point.

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The question then stands thus:— These parties were jointly interested in this property from the death of Mr. *Nerot*; no account has ever been come to, because

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only one account has been insisted on, and the jury have decided against the existence of that supposed account. Therefore, these persons being jointly interested in the property, Miss *Nerot* has continued in the occupation and enjoyment of it from the year 1804 to the year 1819; and the only question is, whether these parties, being jointly interested in this property, were partners, the business having been actually conducted by Miss *Nerot*.

I have read the evidence several times with great attention, with a view of coming to what I could satisfy myself was the just conclusion upon this point; and, though I have entertained doubts at different periods, I think, in the result, I am bound to decide that there was a partnership. I am bound so to decide, unless I reject the testimony of Mr. *Cary*: for his evidence is distinct and precise to that fact. Mr. *Cary* was examined before the jury, and it was there admitted he was a respectable man: he was opposed to Mrs. *Burnand*, who was also examined on that occasion; and I see nothing to lead me to doubt the credit due to Mr. *Cary*. He states, that he acted in this country as the agent for Mr. *Nerot*, who was frequently on the Continent; that he, as his agent, from time to time inspected the books by his authority, and with the consent of Mrs. *Burnand*; that he over and over again pointed out to her errors in the accounts; that he desired her to keep the accounts with more regularity; that she admitted they were kept irregularly, and promised to keep them more regularly in future, saying, "I cannot correct what has already passed, but I have made no private purse;" and that she said repeatedly upon those occasions, that the business was carried on for the joint interest of herself and her brother. It appears that money was paid out of the concern for the benefit of Mr. *Nerot*; that he from time to time advanced monies to the concern; that, when

when the question arose as to the purchase of the house in *Clifford Street*, application was made to him to advance money for that purpose; and she stated, upon his hesitating to do so, that it was as much for her brother's interest, as for hers, that the purchase should be completed.

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Taking these circumstances into account, and the various other circumstances detailed in the evidence of *Mr. Cary*, I am bound to come to the conclusion, not only that *Mr. and Miss Nerot* were jointly interested in the property, but that the business was carried on between them in partnership, though nominally by *Miss Nerot* alone.

I must, however, state, that I have had considerable hesitation, arising out of a letter written by *Mr. Nerot*, while in *Paris*, to his sister. Looking at the terms of that letter, its obvious import is, that he had no interest whatever in the property; and, I confess, I have very great doubts as to whether the explanation attempted to be given was satisfactory. But the circumstance, which guides and governs me as to that letter, is, that it is quite clear that *Mr. Nerot*, according to the verdict of the jury, was in some way interested in the property. Now the letter, if it is to be taken according to its terms, goes to negative that he had any interest. The obvious construction, therefore, to be put upon the letter, would carry us too far; because it would be at variance with that which I must now take to be a fact—at variance with the finding of the jury, that he actually had an interest. This satisfies me, that I must not act upon that letter, in opposition to the evidence of *Mr. Cary*.

Under these circumstances, the question arises as to what decree should be pronounced. One question is,

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When did the partnership commence? I think, upon the evidence, I must take the partnership to have commenced from the death of the father; and for this obvious reason, that the father intended to assign this property to a trustee for his two children, in order that the business might be carried on for their joint benefit in partnership. It is true that the intended assignment never was made; but, no alteration having taken place in the manner of carrying on the business, which had been conducted by Miss *Nerot* during her father's life, and was afterwards conducted by her in the same form, I consider, if she and her brother were afterwards (as by her declaration it appears they were) partners, that I must refer that partnership to the death of the father, pursuant to the arrangement which had been proposed between them.

The next question is, When did the partnership terminate? It was a partnership for no definite period; and either party therefore might, at any moment, have put an end to it by notice. Miss *Nerot* married Mr. *Burnand* without consulting her brother, or, at least, without his assent. If she chose so to change her situation, as to make Mr. *Nerot*, in point of fact, if the partnership went on, a partner with *Burnand*, Mr. *Nerot* had a right, the moment he received notice of that step, to act upon it, and say, "Your marriage has put an end to the partnership." No delay took place in that respect; for the bill was filed as early as *Hilary* term 1820, the marriage having taken place towards the close of the preceding year. I agree therefore with the Vice-Chancellor, in saying that the partnership was dissolved on the 16th of *September* 1819.

It appears to me satisfactorily made out, from all the circumstances, that the house in *Clifford Street* was bought with the partnership property — bought, in the
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first instance, partly with the partnership property, partly with money borrowed by Miss *Nerot* and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership; and, I think, that part of the Vice-Chancellor's decree, by which he directs the house to be sold, must be affirmed.

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There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in *September* 1819. The Vice-Chancellor has directed all the property to be sold, which was in the house in *Clifford Street* at the time when the decree was pronounced, several years after the dissolution of the partnership; as if all the property, which, at the time of the decree, existed in the house, was, without inquiry, to be considered as partnership property. Lord *Eldon* doubted greatly whether that part of the decree could be sustained; and, in my opinion, it must be varied, by directing the Master to take an account of the particulars of the partnership property which were in the house in *Clifford Street* at the time of the dissolution, and of the value of the property at that time; and to inquire whether any part of that property still remains in the house. (a)

The order, made by the Lord Chancellor, was as follows: —

His Lordship doth order, that the decretal order bearing date the 23d day of *April* 1825 be varied, by omitting the words following, viz. “ And doth declare, that the freehold messuage and hereditaments in *Clifford Street* aforesaid, and all and singular the household goods, and furniture, plate, linen, china, and wine, stock in trade, implements, and all other property, effects, and things,

(a) See *Crawshay v. Collins*, 2 *Russell*, 325. 549.

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things, being in or about the said messuage or premises, form a part of the copartnership property,"—and by inserting, instead thereof, the words following, viz. "And doth declare, that the freehold messuage and hereditaments in *Clifford Street* aforesaid, and all and singular the household goods and furniture, plate, linen, china, and wine, stock in trade, implements, and all other property and effects, which were in, upon, about, or belonging to the said messuage and premises, and used or employed in the trade or business of the hotel and baths there carried on, upon the 16th day of *September* 1819, the time of the dissolution of the said partnership, formed part of the co-partnership property;" and also by omitting the following words, viz. "And it is ordered, that the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects, in and about the said premises, be also sold in such manner as the Master shall direct, by a proper person to be appointed by him,"—and by inserting instead thereof, the words following, viz. "Let the Master take an account of the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects remaining in and about and belonging to the said house and premises in *Clifford Street*, and used or employed in the trade or business of the hotel and baths there carried on upon the 16th day of *September* 1819, the time of the dissolution of the partnership, and let him state the particulars of which the same consisted, and the value thereof, at that time, and what part thereof now remains in specie; and the Master is to be at liberty to make a separate report thereof:" and with such variations the said order is affirmed.

The Defendants, Mr. and Mrs. *Burnand*, appealed to the House of Lords; and the decree of the Lord Chancellor was there affirmed.

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REITH v. SEYMOUR.

ROLLS.

Jan. 31.

Feb. 4.

THE testator, *Robert Reith*, by his will, gave all his personal estate to his wife for her life; and, from and after her decease, one moiety thereof was to be at her entire disposal, either by will or otherwise: the other moiety he gave to his brothers and sisters, and the children of some of them.

The testator's property consisted of a sum of 2000*l.* three per cent. Consols, and of other articles of the value only of 130*l.* Soon after the testator's death, the widow sold out the 2000*l.* stock, and invested the produce in the purchase of Long Annuities in her own name, which remained standing in her name at her death. The widow left a will; but it was admitted that there were no words in the will, which could be construed as an appointment of the moiety of the testator's personal estate, if an appointment were necessary.

The bill was filed by the next of kin of the testator, *Robert Reith*, for the purpose of having it declared, that, in the event which had happened, the moiety of the testator's estate was undisposed of at the death of his widow.

Mr. *Crombie*, for the Plaintiffs.

When property is given to a person, without specifying any particular estate, and words are added which purport to give the same person a general power of disposition over it, he takes the absolute interest: but if only a limited estate be given in the first instance, as,

A gift of personal estate to the wife for life, with a direction, that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment.

The sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power.

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for example, an estate for life, and the same words of disposition follow, those words confer merely a power. *Anon.* (a), *Tomlinson v. Dighton* (b), *Bradly v. Westcott*. (c) "The distinction," says Sir *William Grant* (d), "is perhaps slight, which exists between a gift for life with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will: but that distinction is perfectly established; and, in the latter case, the property vests. A gift to *A.* and to such person as he shall appoint is absolute property in *A.* without an appointment: but if it is to him for life, and, after his death, to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to any thing." The widow, therefore, took only a life-estate in the property, with a power of appointing a moiety of it; and as she has not exercised her power, that moiety belongs to the testator's next of kin.

Mr. Wilbraham, contra.

The rule referred to applies only to real estate, being founded on the principle that the heir is never to be disinherited except by express words. Not only does the rule not apply to a residuary disposition of personalty, but there the principle of construction leans quite the other way; the intendment always being that a testator does not mean to die intestate as to any part of his personal estate. In *Bradly v. Westcott* the appointment was to be by will: here there is no restriction as to the manner in which the power of disposition is to be exercised. The question would have assumed quite a different aspect, had the whole of the property been left at the disposal of the widow; for it would then have been difficult

(a) 3 *Leon.* 71.

(b) 1 *P. Wms.* 149.

(c) 13 *Ves.* 445.

(d) 13 *Ves.* 453.

difficult to have assigned a reason why the first gift to her should have been expressed to be "for life," unless it had been intended that these words should limit the quantity of her interest. But here, as her enjoyment of the *whole* of the property was to be for life only, and, after her death, a moiety of it was limited to relations of her husband, it was necessary that the gift to her should be expressed to be for life: the words of restriction are satisfied by, and refer properly to, that moiety, which was not to be at her disposal. The other moiety, therefore, she took absolutely.

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If it shall be holden that she had only an estate for life, with a power of appointment, the acts, which she has done, amount to an exercise of the power in her own favour. Where an appointment is to be "by will or otherwise," the execution of a formal appointment in writing is not necessary: *Irwin v. Farrer*. (a) Any act, shewing an intention to take the property absolutely, would be sufficient. Here such an intention has been manifested unequivocally, by selling the stock and purchasing Long Annuities in her own name. She has been guilty of a clear breach of trust with respect to one moiety: if her acts do not amount to an appointment of the other moiety, she, being only tenant for life, has been guilty of a breach of trust with respect to it too. Her sale of that moiety of the stock must be presumed to have been made by virtue of the only right which she had to dispose of the property, namely, her power.

The MASTER of the ROLLS.

Feb. 4.

In the case of *Irwin v. Farrer*, the legatee herself filed the bill, praying that the trustees might be directed to

(a) 19 Ves. 86.

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to pay over the property to her; and the Court of Exchequer held, that the filing of the bill was equivalent to an appointment, thereby admitting that an appointment by the legatee was necessary. And in this respect the case is an authority for the Plaintiffs. I cannot consider here that the conversion of the 2000*l.* stock into Long Annuities was intended by the widow as an execution of her power to dispose of a moiety of the estate; that sum being in fact nearly the whole of the property of the testator, and the conversion being plainly made to increase her income. Nor can I adopt the distinction contended for between real and personal estate, but am of opinion, that, by reason of the express estate for life given to the widow, she did not take the absolute interest, but had only a power of appointment, which she did not exercise.

Declare, therefore, that one moiety of the testator's estate was undisposed of after the death of the widow, and belongs to the Plaintiffs, as the next of kin of the testator at his death; and that the widow's estate is answerable for a moiety of the 130*l.*, and a moiety of the 2000*l.* stock, or the money produced by the sale of it, at their option, with interest or dividends, according to their option, from the death of the widow; and, if necessary, let the accounts of the widow's estate be taken; and let the costs of the suit be taxed, and a moiety be paid by the Plaintiffs, and the other moiety by the Defendants, in respect that the question was caused by the testator's will, and that his estate must bear the expense of it.

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LONG v. COLLIER.

Rolls.

Feb. 4.

THE bill was filed for the specific performance of a contract for the sale by the Plaintiff to the Defendant, of certain copyhold property held by the Plaintiff for his own life and the lives of two other persons, according to the custom of the manor of *Barton-with-Buddesgate*, in the county of *Southampton*.

The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years.

Upon the hearing of the cause, the usual reference was made to the Master; and he reported in favour of the title. The Defendant took an exception to the Master's report, which now came on to be argued.

The description of the property in the court rolls was as follows: — "One messuage and half yard land, containing ten acres, two tofts of land, one messuage, and one yard land, one cottage with a garden, two acres of arable land and pasture, one croft and one close containing twenty-one acres, and one close containing twelve acres, and the rents of the *Buddle of Chilcombe*." The description in the contract for sale was, "All that capital messuage, tenement, or farm-house, barns, stables, cart-houses, sheds, outbuildings, farm lands, hereditaments, and premises, situate at *Moorstead*, in the county of *Southampton*, as the same are now in the occupation of *Bunney*, as tenant of *Walter Long*, containing by admeasurement 219 acres, more or less."

The Defendant, by computing the messuage and half yard land at ten acres, the two tofts at two acres, the messuage and one yard land at twenty acres, the cottage and garden and two acres of arable land and pasture at two acres, the croft and one close at twenty-one acres, and the other close at twelve acres, attempted to make
out

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out that the description of the property on the court rolls covered only sixty-seven acres, or, at most, by some variation in the calculation, seventy-one acres, and could not be made to apply to 219 acres, which were admitted to be, as stated in the contract, in the actual occupation of *Bunney*, as tenant to the Plaintiff.

On the part of the Plaintiff, evidence was given, that the farm, now occupied by *Bunney*, as tenant to the Plaintiff, had passed through a succession of proprietors to the Plaintiff by the description which now appeared on the court rolls, and, under such description, had been held by the occupiers for the time being for upwards of sixty years past.

Mr. *Hodgson* and Mr. *Lynch*, in support of the exception.

Upon no reasonable interpretation that can be put on the words of the entries in the Court Rolls, can the premises, as there described, be made to correspond in quantity with the premises as described in the particulars of sale. It is certainly true, that the 219 acres have been in the possession of the same persons, who, by the surrenders and admittances, appear to have been the proprietors of seventy-one acres, part of the 219. But the possession of the remainder of the 219 acres may have been without title, or under a title different from the title to the seventy-one acres. A good title is not shewn, unless the identity of the 219 acres with the premises described in the court roll be made out; and it is not easy to imagine, how 219 acres can be identified with seventy-one. The inference of their identity cannot be raised simply upon the circumstance, that the same persons have been in possession of them as owners; nor would the conclusion be much aided, even if it were ascertained that those owners had no title, except that which the entries in the court rolls exhibit.

Mr.

Mr. Sugden, Mr. Preston, and Mr. Tinney, *contra*.

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v.
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The MASTER of the ROLLS over-ruled the exception, stating that the computation of quantity, made by the defendant, was in a great degree fanciful; that the generality and vagueness of descriptions on court rolls were too well known to entitle such a computation to any weight; and that it was well established by the evidence in this case, that the whole property now in the occupation of *Bunney*, as tenant to the Plaintiff, had continually passed and been enjoyed by the description contained in the court rolls.

In the correspondence on the title, which took place before the institution of the suit, the solicitor of the vendor, in answer to an objection that there was no evidence of the identity of the lands, offered to furnish affidavits of their having been passed and held by the description on the Court Rolls. The purchaser did not accept this offer, but raised other objections. The bill was then filed, not making mention of any question as to identity, but stating the other objections as the grounds on which the performance of the contract was resisted. The answer disputed the title generally.

In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports, that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground, that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections.

On the reference of title, the Master over-ruled all the other objections, but required evidence of the identity of the premises. Affidavits of the identity were furnished; and he reported that a good title was first shewn on the 27th of October 1826, which was the time when the affidavits were produced.

The vendor excepted to the report on the ground that the Master ought to have found that a good title was shewn before the filing of the bill.

In consequence of the purchaser insisting upon other and unsubstantial objections.

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LONG
v.
COLLIER.

In support of the exception it was stated, and not denied, that the only point, in which the Master thought that the title, shewn prior to the filing of the bill, had been defective, was the absence of evidence as to the identity of the premises. Now, affidavits of identity had been tendered before recourse was had to litigation; and if they were not actually furnished, it was only because the vendee had not accepted them, but had relied on other objections, in which he failed. The fact of identity, therefore, could not be considered as a point in issue between the parties at the time of filing the bill.

It was further argued, that, even if the report were technically right, yet the rule, which throws upon the vendor the costs of a suit for specific performance up to the time when a good title is shewn, would not apply to a case like the present.

The Defendant insisted, on the other hand, that, till the identity of the premises was established, no title was shewn, and, therefore, that the costs of the suit, or at least so much of the costs as were incurred prior to the 27th of *October 1826*, ought to be paid by the Plaintiff.

The MASTER of the ROLLS.

The Master is right in finding that a good title was not shewn till the 27th of *October 1826*. The exception, therefore, must be over-ruled. But the Defendant might have had the affidavits at any time, if he had expressed a wish for them. The circumstance, therefore, of these affidavits not being actually furnished till after the filing of the bill, cannot have any influence on the question of costs.

Decree for specific performance, with costs.

The

The MASTER of the ROLLS has in other cases followed a similar rule as to costs.

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LONG
v.
COLLIER.
1830.
July 28, 29.

In *Holwood v. Bailey*, the Master reported in favour of the title; but that a good title was not shewn, till at a time subsequent to the institution of the suit.

For the Plaintiff, the vendor, it was stated, that the grounds, on which the Master proceeded in his finding, were, that a recovery had not been suffered, and some certificates, which were set forth in the abstracts, had not been verified, till after the filing of the bill; that the purchaser had never required that these certificates should be verified, and the solicitor of the vendor had, by letter, offered to suffer a recovery, which, however, was not suffered, because the vendee did not accept the offer, but insisted on other objections: and, on the authority of *Long v. Collier*, it was asked, that the decree might be made with costs.

The MASTER of the ROLLS said, that, if the facts were as represented by the Plaintiff, he should make the decree with costs.

But, the statement of the facts being controverted by the Defendant, a reference was directed to the Master to state on what grounds he had proceeded in finding that a good title was not shewn till the time mentioned in his report.

Mr. Tinney and Mr. Koe, for the Plaintiff.

Mr. Bickersteth, Mr. Pemberton, and Mr. Richmond, for the Defendant.

1828.

ROLLS.
Feb. 5.

WILKINSON v. PARRY.

Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee; then, if a retiring trustee assign the trust property to the continuing trustee alone, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable.

IN this case, upon the marriage of one of the Plaintiffs with her late husband, a settlement was made of a sum of 1000*l.*, which was to be invested in stock in the names of two trustees therein described. The dividends of the stock were to be paid to the intended wife for her separate use, with remainder to the children of the marriage equally, as they attained their respective ages of twenty-one. The settlement contained a power to the wife, during her life, and after her death, to the guardians of the children, to appoint a new trustee in the place of any trustee who should die or desire to retire from the trust; and in case any trustee should decline the trust, the settlement directed that such retiring trustee should assign the trust property to the new trustee so to be appointed in his place, and the continuing trustee.

In 1820, the Defendants, *Nicholson* and *Parry*, were the actual trustees, duly appointed according to the power in the settlement; and the trust stock, which amounted to the sum of 1358*l.* 10*s.*, three per cents., stood in their names. In 1825, the Defendant *Nicholson* became desirous of retiring from the trust; and a person of the name of *Sherwin* was appointed in his place. *Sherwin* accepted the trust by signing the deed of appointment; but before he had acted in the trust, he became desirous to retire from it; and a deed, appointing *Parry* to be the sole trustee, was prepared, to which the wife and *Sherwin* were made parties, but which was not executed by *Sherwin*. After the execution of this deed, the Defendant *Nicholson* transferred

ferred the trust stock into the name of *Parry* alone. The Defendant *Parry* subsequently sold out the trust stock at the request of the wife and three of the children of the marriage, who had attained the age of twenty-one; and a deed was executed by these three children, the husband being then dead, for the indemnity of *Parry* in respect of the sale of the trust fund. There were two other children of the marriage, who were still infants.

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It was alleged that the stock was sold out in order to be invested in the purchase of an annuity for the life of the widow, that her income might be increased.

The present bill was filed by the wife and one of the children, who had signed the deed of indemnity, and the two infants, praying that *Nicholson* and *Parry* might be made responsible for the breach of trust committed by *Parry's* sale of the stock. *Nicholson* and *Parry*, and the other children, who were of age, were made defendants to the suit.

At the hearing, *Parry* made default; and the Plaintiffs, as against him, were to take such decree as they could abide by.

Mr. *Pepys* and Mr. *Knight*, for the plaintiffs.

Mr. *Sugden* and Mr. *Pemberton*, for *Nicholson*.

On behalf of *Nicholson*, it was first argued, that no decree could be made in the suit, because two of the Plaintiffs, the widow and one of the children, who had signed the deed of indemnity, were joined with the infants as Plaintiffs. The widow and that child had no right to any relief; they, therefore, had no interest

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which entitled them to maintain a suit. Now, it had been lately decided by the Lord Chancellor (*a*), that to join a person not having an interest, as a co-plaintiff, with a person having an interest, vitiated the whole record, and was a good ground of general demurrer for want of equity; and a bill, which could not stand against a general demurrer, could not be sustained at the hearing.

But this objection was over-ruled by the MASTER of the ROLLS, who stated, that the infants were nevertheless entitled to such decree as the case demanded, and that, as the same justice could be done to the Defendant in respect of the wife and the other child who had signed the deed of indemnity, as if they had been made defendants, the objection in this stage of the cause could not be allowed to have the effect of rendering the expense of the suit wholly useless; and he distinguished this case from that of allowing a demurrer, where it appeared upon the bill that some of the plaintiffs had no interest in the suit.

For the Defendant *Nicholson* it was further argued, that the suit was defective for want of parties; for that *Sherwin*, the trustee named in the place of *Nicholson*, having accepted the office, and not having renounced the trust by executing the deed which appointed *Parry* to be the sole trustee, ought to have been made a party.*

The

(a) *The King of Spain v. Machado*, supra, 225.

* Though the general rule of the Court is, that all, who are jointly liable with the defendants to satisfy the plaintiff's demand, ought to be parties to the suit, yet cases of breaches of trust seem to have been an exception; and it has been held, that a *cestui que trust* may proceed against the surviving trustees alone, without bringing before the Court the representatives of deceased trustees, who

The Master of the Rolls overruled this objection also, referring to the answer of *Nicholson*, in which he admitted that *Sherwin* had retired from the trust, and stating that it would have been an imprudent act in *Sherwin*, if he had executed the deed appointing the sole trustee, and that, under the circumstances, there could be no relief against *Sherwin*.

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PARRY.

Upon the principal point, namely, the liability of *Nicholson*, the Master of the Rolls gave his judgment as follows: —

The MASTER of the ROLLS.

This is a most unfortunate case for the Defendant *Nicholson*, who has acted with perfect integrity and the best intentions, but does not appear to me to have been well advised. By the terms of the trust deed, under which

who were involved in the same acts of misconduct. In *Ex parte Angle* (*Barnard*. 425.), an application was made against the survivors of certain persons, who, under 4 Ann. c. 14., had been appointed managers of briefs issued for the relief of the sufferers by a great fire. The managers had originally been seventeen in number, but seven of them were dead; and it was submitted on the part of the survivors, that the representatives of the deceased managers ought to be brought before the Court. But Lord *Hardwicke's* opinion was, that it was not necessary to bring those representatives before the Court; that an order for accounting ought to be made against the survivors; that these managers were to be considered as one body, and that they were each of them answerable one for the other: "for which reason," said he, "the objection, in relation to the bringing the representatives of the managers that were dead before the Court, was quite immaterial." In *Walker v. Symonds* (5 Swans. 75.), Lord *Eldon* says, "When three trustees are involved in one common breach of trust, a *cestui que trust*, suffering from that breach, and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees."

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which he has acted, he was bound, upon declining the trust, to transfer the trust property to the continuing trustee and a new trustee to be appointed in his place: and nothing could relieve him from that obligation but the consent of all parties interested under the trust. It was not possible to obtain such consent here, because there were infants, who were not capable of consenting, and, therefore, could not be deprived of that security, which they derived from having the trust property, upon *Nicholson's* declining the trust, confided to the care and integrity of two trustees instead of one. I am compelled, therefore, though with reluctance, to declare my opinion, that *Nicholson*, as well as *Parry*, is liable, as it regards the infants, for any loss to their shares of the property, which may be the consequence of the transfer of the stock by *Parry*.

All that I can now do is, to refer it to the Master to inquire, whether any, and which of the parties interested in the trust fund, in any manner, and how, consented to or approved of the transfer of the trust stock by *Nicholson* to *Parry*; and whether any, and which of the parties interested, in any manner, and how, consented to or approved of the sale of the trust stock by *Parry*: and let the Master also inquire how the produce of the trust stock was applied, and what has become thereof: and let the Master be at liberty to state any circumstances specially as to these several matters, at the request of any party: and reserve the consideration of further directions and costs, until after the Master shall have made his report.

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JONES v. DAVIDS.

Rolls.

Feb. 5. 7.

THE Plaintiff filed his bill, on behalf of himself and all other the specialty creditors of the testator, against the heir and the executors.

The Plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond: he is only a simple contract creditor of the testator.

For the Defendants it was objected, that the Plaintiff was not a specialty creditor, and, therefore, could not sustain such a bill.

The Plaintiff had joined as surety with the testator in a joint and several bond; and, after the death of the testator, had paid the amount of the bond to the obligee, taking an assignment of the bond.

Mr. *Griffith Richards*, for the heir of the testator, relied upon *Copis v. Middleton* (a), and cited *Gammon v. Stone* (b), and *Woffington v. Sparks*. (c) The bond, he argued, was satisfied by payment; and the assignment of it to one of the co-obligors was an idle formality; for the assignment of an instrument, which had ceased to have any legal force, could not confer any legal rights.

Mr. *Sugden* and Mr. *Wilson*, for the Plaintiff.

This case is distinguished from *Copis v. Middleton* by the circumstance, that here the bond has been assigned to the surety; and, by virtue of that assignment, he must have against the estate of the principal obligor all the remedies which the obligee might have had. Suppose

(a) 1 *Turn. & Russ.* 224. (b) 1 *Ves. sen.* 359. (c) 2 *Ves. sen.* 569.

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pose the surety had employed a third person to pay the amount of the bond to the obligee, and to take an assignment of it as a trustee for him, the bond in the hands of that trustee would have been a valid security; and the surety, through the medium of his trustee, would have been a specialty creditor on the estate of the co-obligor. Can it, in equity, make any difference as to the nature or degree of his demand, whether the bond is assigned to him or to a trustee for him?

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In *Copis v. Middleton* the surety, *Martin*, had also taken an assignment of the bond; and that circumstance was held not to make his case different from the case of the other surety who had taken no assignment. After the assignment, the action on the bond must be brought in the name of the obligee; and payment by the surety would be an answer to the demand.

The bill must be dismissed; but I will not in this case give the Defendants the costs of the suit, because they ought to have demurred, and thus have saved to both parties all further expense. (a)

(a) *Hill v. Reardon*, 2 Sim. & Stu. 439.

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GREGG v. TAYLOR.

Rolls.

Feb. 7.

THIS cause was instituted for the administration of the estate of the late Mr. *Osgood*, who had named the late Mr. *Cruise*, the conveyancer, his residuary legatee. Mr. *Cruise* died very shortly before the testator; and, at the hearing of the cause, the Court declared, that the testator died intestate as to his residuary personal estate, and referred it to the Master to inquire, who, at his death, were his next of kin.

Persons, who were found by the Master to be the next of kin of the intestate, and were named by the Court to be Defendants in an issue directed to try the rights of other persons, who claimed also to be next of kin, were allowed a sum of 500*l.* out of the estate of the intestate, on giving security to account for it.

The Master reported in favour of two claimants on the paternal side, one of whom was one of the executors; and he disallowed the claims of seventeen other persons, who claimed, to be next of kin, on the maternal side, in equal degree with the allowed claimants on the paternal side.

The disallowed claimants, one of whom was also an executor, took two exceptions to the Master's report; one, in respect of the disallowance of their own claims; and the other, in respect of the allowance of the claims on the paternal side.

There was much evidence with respect to both claims, and the Court expressed an intention to direct them to be tried by two issues: but, the parties residing in different parts of the kingdom, so that the issues could not be conveniently tried at the same time, the Court, for the present, directed one issue only for the trial of the disallowed claims, in which the disallowed claimants were to be Plaintiffs and the allowed claimants Defendants; reserving the direction of the second issue, until after the trial of the first issue.

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v.

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The allowed claimants, as well as the disallowed claimants, now presented petitions, alleging their poverty, and praying each to have a sum of 500*l.* advanced to them out of the estate of the testator, to defray the expenses of the trial of the issue.

The matter was several times spoken to.

Mr. *Sugden*, Mr. *Lovat*, and Mr. *Cooper*, appeared for various parties.

Ultimately *The MASTER of the ROLLS* gave his judgment to the following effect: —

Certain persons claimed before the Master, as next of kin of the testator, and their claim has been disallowed. They are dissatisfied with the Master's judgment, and are willing to try their rights at law. Their claim not being in its nature a legal demand, they can try their right at law only by the assistance of this Court, through the medium of an issue; and this Court has granted them an issue accordingly, in which issue they must of necessity be Plaintiffs.

If their demand had been legal, the executors of the testator would have been the Defendants in the issue; and in case of the success of the claimants, the costs of the Defendants would have fallen upon the testator's estate, having been duly incurred by the executors in the course of administration. Strictly speaking, the executors should be the Defendants here also; and, in like manner, their costs, in case of the success of the claimants, would then fall upon the estate. But the Master, who has disallowed the claims of the Plaintiffs in the issue, has allowed the claims of certain other persons to be next of kin to the testator; and this Court has, therefore, substituted those persons,

persons, as defendants in the issue, in the place of the executors; first, for a general reason, which applies to all cases, because the executors, as such, have no interest in the event of the trial; secondly, because, in this particular case, one executor is of the number of the disallowed claimants, and another executor is of the number of the allowed claimants.

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Grove

v.

Taylor.

Application is now made to the Court, as well by the allowed claimants as by the disallowed claimants, for an advance of money out of the estate of the testator, to enable them to defray the expense of the trial of the issue.

The Court cannot make any advance to the disallowed claimants. Every plaintiff proceeds at law at the hazard of paying the costs, if he fails; and there is no reason here why the rule of law should be departed from.

The case is different with the allowed claimants. They are substituted as defendants in the place of the executors; and, as the executors would have been entitled to an advance of money from the estate, it seems reasonable that those, who are substituted in their place by the Court, shall have the same advantage; and more especially, because the right of the allowed claimants is questioned, and it is to be the subject of a future issue to be directed by the Court; so that it may happen that these substituted defendants may ultimately be found not to be themselves next of kin, and consequently to have no interest in the question now to be tried. It would be unjust to expose them, not merely to the expense of a trial to assist their own claims, but also to the expense of a trial in which they take upon themselves the duty of the executors to resist the claims of others. For these reasons, the Court directs

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directs an advance of 500*l.* to be made to the allowed claimants, who are the substituted defendants in the issue.

If the plaintiffs in the issue should fail, the Court may direct the costs of the issue to be paid by them. If the Plaintiffs in the issue should succeed, the Court may direct the costs of the issue to come out of the estate. But no event of this trial will establish the title of the substituted defendants as next of kin of the testator; and, in either case, therefore, the substituted defendants will have to account in respect of this advance of 500*l.* Under these circumstances, the Court cannot part with this sum of 500*l.*, without security, to be approved by the Master, that they will duly account for the 500*l.* as the Court shall direct. The fact that one of the allowed claimants is an executor cannot affect this principle.

The plaintiffs in the issue claim only in equal degree with the allowed claimants; and if they should succeed, the Court will hereafter direct another issue to try the right of the allowed claimants; and the now Plaintiffs will then be the substituted defendants, and will be entitled to have an advance of an equal sum of 500*l.*, undertaking to account for it as the Court shall direct; but, in respect of their adjudged interest in the estate, security will not then be required of them.

If the Plaintiffs in the issue now directed should fail, the Court will then have to consider who are to be the Defendants in the issue, which is to try the title of the allowed claimants; and what advance of money, if any, shall be made, and to whom, and under what terms.

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PARR v. SWINDELS.

Rolls.

Feb. 11. 14.

IN this case *John Bullock*, the testator, *inter alia*, after giving to his wife, for her life, five freehold messuages in *Chancery Lane*, devised as follows:—
 “And from and after the decease of my said wife, in case my daughter *Mary Parr* shall survive her, I give and devise unto my said daughter *Mary Parr*, all the said five messuages, to hold the same unto my said daughter and her assigns during her life; and, after the death of my said daughter, I give and devise the same unto and equally between and among the children of my said daughter, to take as tenants in common, and not as joint tenants; and, in case she shall die without leaving any lawful issue, then I give and devise the same premises unto and equally amongst the children of my daughters *Charlotte Swindels* and *Hannah Foster*.”

A gift of real estate to *A.* for life, with remainder to her children, as tenants in common, and, in case *A.* shall die without leaving lawful issue, then with remainder over, is a gift to *A.* for life, with remainder to her children for life, with remainder to *A.* in tail.

The testator made no other devise of these five messuages; nor was there in the will any general residuary devise.

The question in the cause was, what estate *Mary Parr* took under this devise.

Mr. *Rose* and Mr. *Lowndes* argued, that the words “in case she shall die without leaving any lawful” gave *Mary Parr* an estate tail by implication; and they referred to the rule as stated by *Fearne* (a), and the cases there cited. The rule, they said, was, that, if there be a devise to *A.* for life, followed by words, which, upon failure of *A.*’s issue and not otherwise, give the

estate

(a) *Fearne on Cont. Rem. and Exec. Dev.* 475—478.

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estate over to other persons, *A.* takes an estate tail by implication.

Mr. *Bickersteth* and Mr. *Wilbraham*, *contra*.

The present case is different from those, in which an estate tail has been raised by implication, to effectuate the general intention of the testator. The gift to *Mary Parr* is followed by a gift to her children; when the testator speaks of her dying without leaving issue, he means such issue as he had spoken of previously, namely, children. The words, therefore, can be satisfied without implication. The testator probably considered (though erroneously) that he had given the fee to the children of *Mary Parr*, if she left any children; and the gift over was intended to provide for the event of her dying, leaving no children behind her.

Mr. *Temple* also contended, that *Mary Parr* took only a life estate; and cited *Hockley v. Mawbey*. (a)

Feb. 14. *The MASTER of the ROLLS.*

The plain intention of the testator was, that this property should not go over, until a failure of the issue of *Mary Parr*; and to effectuate this intention, an estate tail in her must be implied. It is to be considered, whether that estate is to be immediate in her, or in remainder after estates for life to her children. If the intention, that the property should not go over to the children of *Charlotte* and *Hannah*, until there was a failure of issue of *Mary*, could not be effectuated without giving an immediate estate tail to *Mary*, there is in the books sufficient authority to warrant that construction. But as that purpose will, in this case, be equally accomplished

(a) 1 Ves. jun. 146. 3 Bro. C. C. 82.

plished by an estate tail in remainder to *Mary*, after the life estates given to the children, I am of opinion that the better construction is, that *Mary* takes an interest for life, with remainder to her children as tenants in common for life, remainder to *Mary* in tail. This construction will give effect to all the words of the will.

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PARR
v.
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KILLOCK v. GREG.

ROLLS.

Feb. 16.

MR. GILLIES of *Belfast*, entered into a mercantile speculation to *Russia*, jointly with two other commercial houses at *Belfast*: his share of the adventure being one third of the whole.

Messrs. *Greg* and *Lindsay*, of *London*, were appointed the agents of the joint concern, through whose hands all monies were to pass; and they gave the concern a credit to the extent of 34,000*l*.

Mr. *Gillies* afterwards agreed, that Messrs. *Killock* and *Maxwell*, who were the partners in a commercial house at *Cork*, should have one half of his share of the adventure; and they, in consequence thereof, were to become guarantees to Messrs. *Greg* and *Lindsay* for *Gillies'* one-third proportion of the credit given by these gentlemen to the concern. Accordingly, Messrs. *Killock* and *Maxwell*, on the 30th of *September* 1809, wrote the following letter to Messrs. *Greg* and *Lindsay*:—"Our mutual friend, Mr. *John Gillies*, informs us, that you have confirmed credits to the extent of 34,000*l*, for the joint

Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure.

But this obligation ceases to exist, if the transactions shew that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter.

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 KILLOCK
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joint account of himself, *Greg* and *Blacher*, and *Robert Davies*, to be drawn for from *Russia*. We beg, in consequence, to offer guarantee for his one-third proportion of the said sum."

On the 6th of *October* 1809, Messrs. *Greg* and *Lindsay* wrote a letter to Mr. *Gillies*, in the words following:—"We have received from *Killock* and *Maxwell*, of *Cork*, a guarantee for your proportion of the credit we have given to Mr. *Morgan*, at *Archangel*, viz. 10,000*l.*, which he took with him, and 20,000*l.* further, which we are now forwarding in duplicate."

On the 9th of *October* 1809, Mr. *Gillies* wrote a letter to Messrs. *Greg* and *Lindsay*, in the following words:—"Messrs. *Killock* and *Maxwell*, of *Cork*, holding a joint interest with me in our *Russian* adventures, I thought their good name would not be unacceptable to you, and they advise having done the needful."

On the 19th of *May* 1810, Messrs. *Killock* and *Maxwell* wrote to Messrs. *Greg* and *Lindsay* as follows:—"We beg leave to remit you herein 1500*l.*, *Maxwell* on *Anderson* and *Swan* and Co., three months, on account of our common friend, Mr. *John Gillies* of *Belfast*, which you will place to his credit accordingly."

On the 30th of *May* 1810, Mr. *Gillies* wrote a letter to Messrs. *Greg* and *Lindsay*, which, besides matters not relating to the joint concerns, contained the following passage:—"The present serves to hand four bills, amount 2500*l.*; shall shortly remit further; and hope Messrs. *Killock* and *Maxwell* have sent their part of *Morgan's* draft. Messrs. *Killock* and *Maxwell* advise having further sent you 1500*l.*; they have also sent me funds, 4000*l.*, on which account I remit, enclosed, my draft

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draft on *Thornley and Co.*, 3000*l.*, and *Gordon and Co.* will send you a bill for 1000*l.* The other insurances, say one sixth, *Killock and Maxwell*, and the other one sixth upon joint account with *Greg and Blacher*, and *Robert Davies*, I wish you now to cover."

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KILLOCK
v.
GREG.

Much other correspondence passed between *Gillies* and *Greg* and *Lindsay*, which did not bear on the grounds of decision in the cause.

Messrs. *Greg* and *Lindsay* never opened any account with Messrs. *Killock* and *Maxwell*, but carried all monies received and paid, as to one third of the adventure, to the general account of Mr. *Gillies*, with whom they had many other transactions: and, Mr. *Gillies* afterwards becoming a bankrupt, they proved, under his commission, for a balance which was due to them upon that general account.

The present bill was filed by Messrs. *Killock* and *Maxwell*, as the owners of one-sixth share of the concern, for the purpose of compelling Messrs. *Greg* and *Lindsay* to account with them in respect of all monies received and paid on the *Russian* adventure.

Mr. *Agar* and Mr. *Pemberton*, for the Plaintiffs.

The Plaintiffs, by their contract with *Gillies*, became interested in the adventure to the extent of one sixth; and this acquisition of interest by them was immediately notified to *Greg* and Co., who had the advantage of their guarantee for the repayment of such monies as might be advanced on account of that one third share, which had belonged originally to *Gillies*. The knowledge, which the agents had of this state of things, imposed on them the obligation of keeping distinct accounts with
the

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the Plaintiffs and with *Gillies*. Either one sixth of the monies received on account of the adventure ought to have been carried to the credit of the Plaintiffs, or the whole produce of the one-third share ought to have been carried to the joint account of the Plaintiffs and *Gillies*. Instead of taking this course, *Greg* and Co. have carried the whole produce of that one third share, of which they knew that one half belonged to *Killock* and *Maxwell*, to the general account of *Gillies*: in other words, they have chosen to give credit to *Gillies* for monies which the Plaintiffs alone had a right to demand or receive.

Mr. *Bickersteth* and Mr. *Wigram*, *contra*.

One of several partners cannot, by a contract with a stranger, give that stranger a right to a general account of the partnership dealings. *Bray v. Fromont*. (a) The agreement between *Gillies* and the Plaintiffs constituted the latter, not partners in the adventure, but only sub-partners: and their right to an account was against *Gillies*, and not against *Greg* and Co. Even if the transactions were originally of such a nature that they might have given the Plaintiffs a right to an account against *Greg* and Co., the subsequent conduct of the parties shews that the intention was, that *Greg* and Co. should account with *Gillies* only, and that *Gillies* and the Plaintiffs should arrange with each other their respective rights and liabilities. The Plaintiffs make their remittances through *Gillies*, and in the name of *Gillies*, to be placed to the credit of *Gillies*; and even when they transmit money directly to *Greg* and Co., they give express orders for placing it to the credit of *Gillies*. Monies thus remitted ought to have been placed to the credit of the Plaintiffs, if *Greg* and Co. had

(a) 6 *Mad.* 5.

had been to account with them for the one-sixth of the adventure; but, as the sums, which the Plaintiffs advanced on account of their interest in the concern, were to be placed to the credit of *Gillies*, it followed of course, that the produce of the adventure, attributable to that interest, was to be carried to the same account.

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Mr. *Agar*, in reply.

The question here is not between partners, and does not relate to the rights which a partner may give a third person against his co-partners: it is merely a question between principal and agent; and the agent insists that, having been accountable to *A.* and *B.*, he is discharged from accounting to *A.*, because he has given *B.* credit, in the general account between him and *B.*, for the monies which belonged to *A.* There is nothing in the particular circumstances of the case to take it out of the general rule of law. As the interest in the adventure had originally been distributed into three equal shares, it might be convenient that the monies advanced on account of the share, which originally belonged to *Gillies*, should be placed to his credit; and it might be convenient for *Greg* and Co., or for the Plaintiffs, that the remittances from the latter should be made through *Gillies*: but, in whatever form the agents might keep the account, they knew that one sixth of the sums received in respect of the adventure belonged to *Killock* and *Maxwell*; and nothing short of the most plain and express directions from those gentlemen could have authorized them to transfer *Killock* and *Maxwell's* share of the receipts from the accounts of the disbursements and receipts, in respect of the *Russian* adventure, to the general account between the agents and *Gillies*. They have in fact paid, with the money which they owed to *Killock* and *Maxwell*, a debt which *Gillies* owed to them.

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When Messrs. *Greg* and *Lindsay* received advice from Mr. *Gillies* that Messrs. *Killock* and *Maxwell* were interested in a moiety of his third share of the *Russian* adventure, it certainly imposed upon them the duty of accounting with Messrs. *Killock* and *Maxwell* in respect of their proportion; and if the case rested there, the Plaintiffs would be plainly entitled to the relief prayed by the bill. But the subsequent transactions amount to notice to Messrs. *Greg* and *Lindsay*, that it was the intention of Messrs. *Killock* and *Maxwell*, as well as of Mr. *Gillies*, that Messrs. *Greg* and *Lindsay* should account solely with Mr. *Gillies* in respect of the one-third share, as if he had continued to be solely interested in it, and that Messrs. *Killock* and *Maxwell* were content to rest upon the personal responsibility of Mr. *Gillies*. The first payment by Messrs. *Killock* and *Maxwell*, on account of the joint concern, was a remittance of a sum of 1500*l.* made to Messrs. *Greg* and *Maxwell* directly, on the 19th of *May* 1810; and the letter of that date, in which it was enclosed, desires Messrs. *Greg* and *Lindsay* to carry it to the account of Mr. *Gillies*, and to place it to his credit. The letter from Mr. *Gillies* to Messrs. *Greg* and *Lindsay*, in the following month of *May*, refers to this sum of 1500*l.* as remitted by Messrs. *Killock* and *Maxwell* on account of the *Russian* adventure, and states that Messrs. *Killock* and *Maxwell* had also sent to him, *Gillies*, a sum of 4000*l.*, which is evidently on account of their interest in the same adventure; and this 4000*l.* *Gillies* remits to *Greg* and *Lindsay*, and would, of course, be credited by them with such remittance.

If it had been the intention of the parties, that Messrs. *Greg* and *Lindsay* should account directly with Messrs. *Killock* and *Maxwell* in respect of their moiety of
Gillies's

Gillies's share, the instructions as to the 1500*l.* must necessarily have been, that it should be carried to the credit of Messrs. *Killock* and *Maxwell*; and the 4000*l.* which was the remainder of the advance made by *Killock* and *Maxwell* on the adventure, would not have been sent by them to Mr. *Gillies* to be credited in account between *Gillies*, on the one hand, and *Killock* and *Maxwell*, on the other, but would have been sent directly by *Killock* and *Maxwell* to Messrs. *Greg* and *Lindsay*, to be credited by them to the account of *Killock* and *Maxwell*.

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There is no evidence on the part of the Plaintiffs to repel the inference necessarily arising from the two letters referred to. The Plaintiff's bill must therefore be dismissed with costs.

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Feb. 16.
March 13.

GRANT v. LYNAM.

Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.

THE testator, *John Veal*, made his will, *inter alia*, in the following words:—"I give and bequeath my present dwelling-house, garden, premises, and land adjoining, now in the occupation of Mr. *Charles Baker*, to *Elizabeth*, my dearly beloved wife, for her use and benefit during her life, and with a power of giving and disposing of the said house and premises after her decease, with the limitation and condition of her bequeathing the same to any one of my own family she may think proper. *Item*, I give and bequeath to my said wife all my household furniture, plate, linen, books, and other utensils; and, after her decease, to any one or more of my own family she may wish or direct."

Elizabeth Veal, the testator's wife, survived him, and by her will "gave and bequeathed all her leasehold property, her monies and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money, and to stand possessed of the same, for the only use and benefit of *John Grant*, when he should attain twenty-one; and if he should die before twenty-one, then to the only use and benefit of the brothers and sisters of the said *John Grant* who should be living at the time of his decease, with benefit of survivorship between them."

It was proved in the cause, that the testatrix, at the time of her will and her death, had no other lease-property than the dwelling-house bequeathed to her

her by her husband. *John Grant*, the legatee, was nearly related to the testator *John Veal*, but was one degree more remote than his next of kin.

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It was not contended that *John Grant* could claim any part of the personal chattels of the testator *John Veal*, which might be in the possession of his widow at her death, under the general description of "her monies, &c.;" but it was insisted, that, inasmuch as the testatrix had no other leasehold estate than the dwelling-house specifically described in the testator's will, the bequest of all her leasehold property amounted to evidence of her intention to exercise her power in that respect; and further, that *John Grant*, being one of the testator's family, was capable of taking, although not one of his next of kin.

In support of these positions, Mr. *Treslove* and Mr. *Hayter* argued, that evidence is always received to shew, that a donee of a power, who has devised real estate, without specific reference to his power, had no real estate which he could devise, except that which was the subject of his power; and if it is shewn that there is no other property to answer the devise, the will is held to be an execution of the power, though it contain no express reference, either to the power, or to the property, which was the subject of that power. *Standen v. Standen* (a), *Brudly v. Westcott* (b), *Lewis v. Lewellyn* (c), *Bennett v. Aburrow* (d), *Andrews v. Emmott* (e), *Denn v. Roake*. (g) So far, therefore, as relates to the description of the property, the words of *Elizabeth Veal's* will are sufficient to be an execution of the power; and the only question that remains is, whether the person,

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(a) 2 *Ves.* jun. 589.

(b) 13 *Ves.* 445.

(c) 1 *Turn. & Russell*, 104.

(d) 8 *Ves.* 609.

(e) 2 *Bro. C. C.* 298.

(g) 5 *Barn. & Cres.* 720.

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in whose favour the appointment has been made, is one of the class within which the objects of the power are comprised. That class consists of all persons who can be said to be "of the testator's family;" and all are of his family, who are related to him by blood. The term "family" admits of very wide and various significations; and there is nothing in the context of this will to restrict its import. *Wright v. Atkyns* (a), *Cruwys v. Colman* (b), *M'Leroth v. Bacon* (c), *Brown v. Higgs* (d), *Sugden on Powers*. (e)

Sometimes the words "family" and "relations" have been held to denote the next of kin; but they have received that limited sense, only when they described a class, among whom a fund was to be distributed. All within the class were to share; and, therefore, in such cases, courts of justice have been obliged to put a limited signification upon terms, the indefinite import of which would otherwise have created extreme embarrassment. But no difficulty of that kind arises, where the word "family" or "relations" is used to denote the class, from which the donee of a power is to select an object of bounty: the exercise of the power limits the gift to one or more individuals; and, accordingly, the term, which describes the class whence the selection is to be made, is construed in its widest import, and is not subjected to any technical restriction. *Harding v. Glyn* (g), *Forbes v. Ball*. (h)

Mr. Skirrow, *contrd.*

In all the cases, in which evidence has been received to shew that there was no property to answer a devise,
except

(a) 17 *Ves.* 255.

(b) 9 *Ves.* 319.

(c) 5 *Ves.* 159.

(d) 4 *Ves.* 708. 5 *Ves.* 495.

(e) Page 522.

(g) 1 *Atk.* 469. 5 *Ves.* 501.

(h) 3 *Mer.* 437.

except the subject of the power, the question related to freehold lands; and the same rule does not extend to chattel interests or personalty. *Jones v. Tucker* (a), *Jones v. Curry*. (b)

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If the evidence be rejected, which has been entered into in order to shew that the testatrix had no leaseholds of her own, there will remain no reason to believe that either the power or the subject of it was present to her mind, when she made this will. Besides, the leasehold is comprised in the same clause with "monies, goods," &c., and, along with them, is made liable to the payment of her debts, and funeral and testamentary expenses. Such a charge of debts is wholly inconsistent with an intention to exercise her power.

Even if the will is an exercise of the power as to the leasehold, yet "family" must mean, according to its usual legal import, *next of kin*, unless something can be found on the face of the will, which shews that it is to be taken in another sense: and then the appointment will be void, as having been made in favour of a person, who, though of the family of the testator, is not one of his next of kin.

Mr. *Phillimore*, for a party in the same interest, cited *Nannock v. Horton*. (c)

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It is well settled, that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee, giving freehold estate, will be so far deemed an execution of the power; for other-

(a) 2 *Mer.* 533.

(b) 1 *Swanst.* 66.

(c) 7 *Fes.* 391.

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otherwise the will, as to that property, would wholly fail. There is no distinction between freeholds and leaseholds in the nature of the subjects; the difference is only in the quantity of interest: and there does not appear to me to be any solid ground, upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of monies, securities for monies, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and, as to them, the will must refer to them as the subjects of the power, or they will not pass.

Upon the other point, whether the gift to *John Grant* is good, he not being one of the testator's next of kin, the leading case is *Harding v. Glyn*, imperfectly reported in *Atkyns*, but correctly referred to in other cases by Lord *Eldon*, Lord *Redesdale*, and Sir *W. Grant*. There the testator gave to his wife his house in *Hatton Garden*, and all the goods, furniture, and chattels therein at the time of his death; and also all his plate, linen, jewels, and other wearing apparel, and did desire her, at or before her death, to give the same unto and amongst such of his own relations, as she should think most deserving and should approve of. The widow, by her will, gave the house in *Hatton Garden* to *Henry Swindale*, and made no other disposition of the rest of the property bequeathed to her by her husband; but, after giving some legacies, she gave in general terms the residue of her personal property to certain persons, whom she made her executors. *Henry Swindale*, to whom the house in *Hatton Garden* was given, was a relation of the testator, but not his next of kin. The reported

reported decision in that case is, that, as to the property of the husband not disposed of by the wife, the term "relations" should be construed as *next of kin*; and no notice is taken, in the judgment, of the house in *Hatton Garden* bequeathed to *Henry Swindale*. But, upon reference to the registrar's book, it appears that the gift to *Henry Swindale* was established. The principle, therefore, of that case is, that, where the author of the power uses the term *relations*, and the donee does not exercise the power, there the Court will adopt the statute of distributions as a convenient rule of construction, and will give the property to the next of kin; but that the donee, who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin.

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I cannot find that the doctrine of that case has ever been impeached; on the contrary, it has been repeatedly acted upon; and the same rule has been applied with respect to personal estate, where the word *family* has been used in the place of *relations*.

In addition to the cases which have been cited in the argument, I refer to the case of *Mahon v. Savage*. (a) In the case of *M^cLeroth v. Bacon*, Lord *Alvanley*, proceeding upon the special words of the will, considered a husband as one of the family of the wife; and, in *Atkyns v. Wright*, Lord *Eldon* held, that, as to real estate, a direction to the donee to devise the property to the family of the donor, created a trust for the donor's heir as *persona designata*. But the cases do not break in upon the general rule, as I have stated it, with regard to personal estate: and I declare, therefore, that *John Grant* is entitled to the leasehold dwelling-house of the testator, according to the terms and conditions of the will of the donee of the power.

(a) 1 Sch. & Lef. 111.

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Feb. 15. 19.

March 17.

FLIGHT v. BOLLAND.

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual.

THE bill was filed by the Plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the Defendant, having discovered that the Plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the Court, that the bill might be dismissed with costs to be paid by the Plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order, that the Plaintiff should be at liberty to amend his bill, by inserting a next friend for the Plaintiff; and the bill was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

Mr. *Bickersteth* and Mr. *Koe*, in support of the objection.

There is no instance of a decree for specific performance at the suit of an infant, and it would be contrary to the principles of a court of equity to entertain such a suit. Courts of equity, acting merely on equitable principle, will not lend their aid, where the remedy is not mutual: want of mutuality has always been deemed a sufficient ground for refusing specific performance of a contract. *Howell v. George (a)*, *Lawrenson v. Butler (b)*. It is clear that specific performance could not be decreed against

(a) 1 *Mad.* 1.(b) 1 *Sch. & Lef.* 13.

against an infant, *Co. Lit.* 2 *b.*; and, therefore, it will not be decreed at the suit of an infant. Even if a decree were made according to the prayer of the bill, it would be impossible for the Court to compel the Plaintiff to execute that decree. He could not be forced to pay the purchase-money; and, on attaining his full age, he might repudiate the contract and the suit. At law, an infant may maintain an action for breach of a contract, *Warwick v. Bruce* (a); but he has no remedy in equity.

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Mr. Pepys, Mr. Morley, and Mr. Stuart, for the Plaintiff.

There are cases, in which a court of equity will decree specific performance, though there is not mutuality of remedy. If a husband, seised *jure uxoris*, were to contract for the sale of his wife's estate, the husband and the wife could enforce the contract against the purchaser; yet, if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that the wife would not consent, a court of equity would not now interfere: it would neither decree the wife to join in the conveyance, nor would it order the husband to procure her concurrence, and send him to prison till that concurrence was obtained. In like manner, a party, who has signed an agreement, cannot enforce it against a party who has not signed it; and yet the latter may enforce it against the former. *Martin v. Mitchell* (b), *Hatton v. Gray* (c), *Coleman v. Upcot* (d), *Buckhouse v. Crossby* (e), *Owen v. Davies* (g), *Seton v. Slade* (h), *Western v. Russell*. (i) The observations, made by Lord Redesdale

(a) 2 *M. & S.* 205.

(b) 2 *Jac. & Walk.* 426.

(c) 2 *Ch. Ca.* 164.

(d) 5 *Vin. Abr.* 527. *pl.* 17.

(e) 2 *Eq. Ca. Ab.* 52. *pl.* 44.

(g) 1 *Ves.* sen. 82.

(h) 7 *Ves.* jun. 265.

(i) 3 *Ves. & B.* 187.



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dale in *Lawrenson v. Butler* (a) are not law. Mutuality of remedy, therefore, is not essential to entitle one party to file a bill for specific performance against another.

In *Clayton v. Ashdown* (b), specific performance of an agreement made by an infant was decreed. In *Campbell v. Leach* (c), observations are made which amount to this, that it is not an objection to a bill for specific performance that the party, asking the aid of the Court, could not have been compelled to perform the agreement; and the instance of a contract between an infant and an adult is referred to as a case, in which the one is bound, though the other is not. In *Shannon v. Bradstreet* (d), one of the objections taken by the defendant was, that there was not mutuality of remedy; and, the instance of a contract between an infant and an adult being mentioned, Lord *Redesdale* said (e), "That case is no answer to the difficulty raised; it is the peculiar privilege of infants, for their protection, that, though they are not bound, yet those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract." The Court may refer it to the Master to inquire, whether it is for the benefit of the infant, that the agreement should be performed.

Mr. *Bickersteth*, in reply.

In *Clayton v. Ashdown* the infant had attained his full age, and had affirmed the contract, before the bill was filed. With respect to cases under the statute of frauds, if the party who has not signed the agreement files the bill, he gives the Court jurisdiction to bind him by the agreement; and from that moment there is mutuality of remedy. *Martin v. Mitchell*. (g) No case has occurred—

at

(a) 1, *Sch. & Lef.* 20.

(b) 9 *Fin.* 395. *pl.* 1.

(c) *Amb.* 740.

(d) 1 *Sch. & Lef.* 52.

(e) 1 *Sch. & Lef.* 58.

(g) 2 *Jac. & Walk.* 427.

at least none has occurred since the time when it was settled that the Court will not decree a husband, who has contracted for the sale of his wife's estate, to procure her to join in making a good conveyance—in which such a contract has been enforced against the purchaser.

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No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed, that it is a general principle of courts of equity to interpose only where the remedy is mutual. The Plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the statute of frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned by Lord *Redesdale* upon the ground of want of mutuality. But these cases are supported, first, because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

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SMITH v. TOLCHER.

As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the tithe did not form any inducement to the purchaser to enter into the contract.

THE bill was filed for the specific performance of a contract, made by the Defendant, for the purchase of a mansion-house and lands, which, including offices, garden, and pleasure ground, contained, altogether, about nineteen acres.

In consequence of an advertisement describing the premises to the effect above stated, the agent of the purchaser, in a letter to the agent of the vendor, dated the 27th of *August* 1825, proposed to purchase the property for the sum of 6300*l*. These proposals the agent of the vendor, in a letter dated the 29th of *August*, accepted; and directions were given to prepare a formal contract. The agent of the vendor, upon a subsequent reference to the title deeds, found that the conveyance to the vendor included the great tithes of the nineteen acres; and, he having mentioned this circumstance to the agent of the purchaser, who was to draw up the formal agreement in writing, the latter introduced the great tithes as a part of the property purchased. The insertion of the great tithes either was not observed by the agent of the vendor, or was not objected to by him, because he considered them of no value, and that the vendor meant to sell all that was included in his own purchase; and an agreement, dated the 10th of *September* 1825, and including the great tithes, was sent to and signed by the vendor and purchaser.

No mention of tithes had been made, either in the advertisement, or in the correspondence between the agents,

agents, in which the price and conditions of the agreement had been fixed; nor was any addition made to the price, in consequence of the tithes being included in the formal contract.

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Upon investigating the title to the great tithes, it appeared that the legal estate of one moiety of those tithes was vested in an infant; and on that ground the purchaser objected to complete the purchase. About twelve acres, out of the nineteen which were the subject of the purchase, were occupied by the mansion-house and offices, the garden, and pleasure grounds; and the remaining seven acres, which adjoined, were in pasture; and, consequently, there was little probability, that any great tithes could ever arise on the property. In a letter written by the solicitor of the purchaser, he admitted that the purchaser had changed his mind with respect to the purchase, and for that reason took the objection as to the great tithes.

The vendor, before the suit and in his bill, offered to make compensation for the value of the great tithes.

On the part of the Defendant the case was rested, at the hearing, upon the ground, that it was now the settled rule of the Court, that tithes were not the subject of compensation.

Mr. Horne and Mr. Parry, for the Plaintiff.

The nature of the property, the history of the agreement, the conduct of the parties, shew that the great tithes are not essential to the enjoyment of the property which was the real subject of the contract. Here the land is laid out in pleasure-grounds, and is a mere appendage to the mansion-house. To break it up so as
to

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to make it productive of great tithes, would lessen the value of the property. *Tolcher* bought the premises as a place of residence; and his objection is, that he finds he might be exposed to a small possible inconvenience, if he were to convert the property to a purpose totally inconsistent with that for which he bought it, and were to deal with it in a way which would destroy its value. The substance of the contract is to be found in the letters of the 27th and 29th of *August*, in which the price is fixed at 6300*l*. Neither in these letters, nor in any step of the negotiation, did the parties consider themselves to be selling and buying great tithes; and when the tithes were included in the formal contract, no addition was made to the price which had been previously fixed, without reference to them. If they had been considered to be of any value or importance, some addition to the price would have been made, or, at least, would have been asked. Under these circumstances, they are a fit subject for compensation.

Mr. Pepys and *Mr. Swanston*, for the Defendant.

The agreement, of which the bill seeks to enforce performance, is not an agreement contained or supposed to be contained in the letters of the agents, but is to be found in the formal contract of the 10th of *September*, which expressly includes the great tithes. When a man buys an estate and the tithes of it, the law presumes that he would not have bought the estate without the tithes; the taking of tithes being an interruption of enjoyment, and an annoyance, which every one is anxious to avoid. He who sells an estate and the tithes of it, is bound to make a title both to the land and to the tithes; and if he cannot make a title to the tithes, a court of equity will not compel the purchaser to take the land,
 and

and be satisfied with a compensation for the tithes.
Binks v. Lord Rokeby (a), *Ker v. Clobery*. (b)

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The rule of equity is, that, if a good title cannot be made to a part of the property agreed to be sold, and that part is material to the enjoyment of the remaining part, as to which a good title can be made, a purchaser shall not be compelled to take such remaining part with a compensation for the rest; it being reasonable to infer, that the purchaser would not have entered into the contract, if it had not included that material part. In opposition to prior authority the other way, it may be said to be now settled, that a man, who agrees to purchase a landed estate which is described to be tithe free, shall not be compelled to complete his purchase, if it turn out that the land is subject to tithe; it being considered as a general rule, that the right to the tithe is so material to the enjoyment of the land, as to have formed the inducement to the purchase. The good sense of this general rule is not to be disputed. But there may be cases of obvious exception to this general rule; and such a case actually occurred in *Binks v. Lord Rokeby*, before Lord *Eldon*, who is to be regarded as the author of the rule. A considerable landed estate was contracted to be sold tithe free, and a good title was shown to all the tithe, except as to a very few acres; and Lord *Eldon* held, that the right to the tithe of these few acres could not be considered so material to the enjoyment of the rest of the estate, as to have formed the inducement to the purchaser to enter into the contract; and he compelled the purchaser to complete his contract, with a compensation for the value of those tithes, as to which the title was defective.

To

(a) 3 *Swanst.* 222.

(b) *Sugden's Law of Vendors*, 259.

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To apply Lord *Eldon's* principle to the present case. Here the purchaser, by his agent, actually contracted to purchase the property at the agreed price, without the tithes; and the tithes were afterwards added to the written agreement by his solicitor, who prepared it, without any further treaty on the subject, and without any increase of the price. The right to the tithe could not possibly, therefore, be the inducement of the purchaser to enter into the contract. The tithes could have been omitted, by the vendor or his agent, in the description originally given of the property, and afterwards admitted into the agreement, only because they were substantially of no value; and it is not easy to see how they can be of the value of the smallest piece of coin, since, as an appendage to the enjoyment of the mansion-house, there is no probability that the seven acres will ever be productive of great tithes. Upon the whole, the purchaser cannot be permitted to escape from his contract upon this pretence; but, the vendor having submitted to make him compensation for the value of the great tithe, let the Master ascertain that value, and let it be deducted from the purchase money.

Decree with costs.

1828.

Ex parte LAKIN,

ROLLS.
Feb. 13.

In the Matter of LAKIN.

THIS was a petition, without bill, by two infants, to have maintenance allowed.

The Court will make an order for appointing a guardian and allowing maintenance, upon petition without bill, where the infant's income does not exceed 300*l.* a year.

From the statements in the petition, it appeared that the infants were entitled, under three different wills, to property, consisting of money lent on mortgage, stock in the public funds, a leasehold house, shares in the *Birmingham Canal*, &c., which yielded in the whole an aggregate income of from 450*l.* to 500*l.* a year; so that each of the infants had an annual sum of more than 200*l.* applicable to his maintenance. The father was alive, but was alleged not to be of ability to maintain his children.

The question was, whether, where the income was of that amount, the Court would make the order unless a bill were filed?

Mr. *Lovat*, for the petition, referred to the case of *Ex parte Myerscough* (a), where the Court had made the order, the infant's income being 200*l.*

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After observing that there should be some precise limit as to such applications, and that he could find none, made the order as prayed; and he observed, that,

(a) 1 *Jac. & Walk.* 151.

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Ex parte
 LAKIN.

that, unless the rule was otherwise fixed by the Lord Chancellor, he should entertain such petitions, where the income did not exceed 300*l.* a year. *

The

1824.
 June 25.

* In the Matter of Sir WILLIAM MOLESWORTH.

Maintenance will not be allowed, without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l.*

This was the petition of an infant, and of his mother, who was his testamentary guardian, for a reference to approve of a proper allowance for his maintenance and education. The infant was entitled to real estates of large annual value; and there was no suit depending in court.

Mr. Temple, for the petition.

It was formerly supposed that maintenance would not be allowed upon petition, unless the real estate of the infant was very inconsiderable. That notion is now exploded; and the case of *Ex parte Myerscough* (a) established the rule, that, where there was simply a question as to the amount of maintenance, and a clear fund existed, out of which it could be allowed, without entering into any accounts, the reference would be ordered upon pe-

tition, whatever might be the amount of the infant's fortune. Here, there is a clear annual revenue, which the guardian is receiving; and a suit will serve no useful purpose.

LORD GIFFORD, MASTER of the ROLLS.

This subject having been brought more than once under my consideration, I have conferred with the Lord Chancellor upon it; and the result of that communication authorizes me in saying, that, according to the present law of the Court, maintenance will not be allowed, without a bill filed, to an infant entitled to real estate, except in cases where the property is very small. A petition alone has been held sufficient, when the estate did not exceed 100*l.* per annum: but doubts may well be entertained, whether, even in that relaxation of the practice, the

(a) 1 Jac. & Walk. 151. where the principal cases on this subject are cited.

The order was made, directing the Master to inquire whether the father was of ability to maintain the petitioners; and if he were found not to be of ability, then to approve of a proper allowance for their maintenance.

Reg. Lib. 1827. B. 561.

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Ex parte
LAKIN.

the Court did not go farther than it ought to have done, where real estate was concerned; and I will not carry the relaxation to a greater length. Where the estate is of more value than 100*l.* a year, I will not upon petition make an order of reference to approve of a proper maintenance, but will put the parties to file a bill.

SCAIFE v. SCAIFE.

ROLLS.

Feb. 19.

March 5.

IN this case the testator had made several wills, which purported to dispose of his real estate. The last of these instruments was dated in *March* 1824, and by it *Robert Scaife* was appointed sole executor. After the death of the testator, *Robert Scaife*, who was his heir at law and customary heir, renounced probate of the will, and filed a bill, putting the validity of the several wills in issue, and alleging that they were not duly executed and attested, and that the testator, at the time of making them, was not of sound and disposing mind.

If an heir at law, alleging insanity in a deviser, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it.

The bill stated, that, among other property, the deviser was entitled to certain customary freeholds, which by the custom of the manor could not pass by devise; that the deviser, when of sound mind, had conveyed these customary freeholds to one of the Defendants, upon trust to convey as he, the testator, should direct by his will; and it prayed that the trustee might convey the customary freeholds to the Plaintiff, that

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the Plaintiff might be quieted in his possession of the real property of his ancestor, and that proper issues might be directed to try the validity of the wills.

Administration, *pendente lite*, with the will made in March 1824 annexed, had been granted to *Thomas Scaife*, the second son of the testator; and *Robert Scaife* had not contested the validity of the will, in the ecclesiastical court.

At the hearing, the Court directed an issue *devisavit vel non*, which was found against the Plaintiff; and now, upon further directions, the question was as to the costs of the suit.

Mr. *Horne* and Mr. *Crompton*, for the Defendants, insisted that the heir ought to pay the costs of the suit and of the issue; and they cited *Johnson v. Gardiner*. (a)

Mr. *Pemberton*, *contra*, cited *Leacroft v. Maynard* (b), *Leman v. Alie* (c), *Shales v. Barrington* (d), and referred to the various other cases collected in *Beames's Doctrine of Costs*, 94—98.

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If in this case the heir could have asserted his claims by ejectment, then, upon the authority of *Webb v. Claverden* (e), and subsequent cases, his suit must have been deemed vexatious, and he must have paid the costs. But, the circumstance of the trust of the customary freehold rendering it necessary for him to come into equity, let his bill be dismissed without costs. The costs of the issue he must pay.

(a) 1 *Dick*. 513.

(b) 1 *Ves.* jun. 279.

(c) *Amb.* 165.

(d) 1 *P. Wms.* 481.

(e) 2 *Atk.* 424.

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HAYES v. HAYES.

ROLLS.

Feb. 25. 26.

April 24.

THE will, upon which the question in this cause arose, was in the words following: — “It is the most sincere and unalterable wish of I, *Anne Thomas Hayes*, (who is the writer of this,) widow of the late Rev. *William Hayes*, minor canon of *St. Paul’s* cathedral, who died *October* the 20th, 1790, and left me seven children, viz. *William*, born at *Lambeth*, *February* 24. 1775; *Ann*, born *July* 26. 1777; *Eliza*, born *May* 18. 1780, in the parish of *St. Gregory, London*; *Philip*, born *October* 12. 1781, in the parish of *St. Gregory, London*; *Sophia*, born *October* 4. 1783, in the parish of *St. Gregory, London*; *Caroline*, born *November* 26. 1785, in the parish of *St. Gregory, London*; *Ann Thurlow*, born *March* 26. 1787, in the parish of *St. Gregory, London*,—I repeat that it is my most fervent and unalterable wish, that, after my decease, my above-named seven children may inherit all the property that I may then possess, both in money and goods, in the manner as I shall hereafter describe: by the blessing of my heavenly Father, 5000*l.* stock, which I have inherited by the death of my late brother, Mr. *John Soaper*, and which is in the 3 per cent. consols, for every good and substantial reason, must ever remain there an undivided fund, as long as the 3 per cent. consols may exist; and for no cause or consequence whatsoever must the principal ever be diminished. I then in the manner following bequeath 20*l.* a year to each of my two sons, viz. *William* and *Philip Hayes*; and to my five daughters, 22*l.* a year to each of them, as long as they may live; and in case of

A limitation to an unborn child for life is not good, unless the remainder vests in interest at the same time.

A testatrix, after expressing her desire that certain stock should remain in the three per cents. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them; and directed, that, after the decease of all of them, their children should succeed to the annuity of their deceased parent, and that, after the decease of the seven children’s children, the dividends of the stock should devolve in annuities upon the lawful heirs of the testatrix:

the

Held, that all the seven children.

the gifts were void, except the life interests given to the

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the decease of any one of my above seven children, their annuity to devolve by a proper division among the rest of the surviving children of *Anne Thomas Hayes*; and in case of marriage of any one of my children, no husband, wife, or child born of such marriage shall claim any right or title of inheritance to succeed to any annuity after the decease of any one of my children, whilst there is one of the seven children of I, *Anne Thomas Hayes*, existing; but after the decease of the whole of my seven children takes place, then shall their children, lawfully begotten, succeed severally to the annuity of their deceased parent, upon their producing a legal claim to it, which must hereafter be assured to them by a proper deed or settlement: and, after the decease of my seven children's children, the dividend arising from the above 5000*l.* shall devolve in annuities upon the lawful heirs of I, *Anne Thomas Hayes*, for ever."

At the time of the testatrix's death, all her seven children were living; and they were her sole next of kin. None of them had then any issue, but several grandchildren were afterwards born.

The bill was filed by six of the children against their brother *William Hayes*, the administrator of the testatrix, and all the grandchildren in *esse*.

The question in the cause was, whether all or some of the interests, given after the estates for life to the seven children, were not void as too remote.

Mr. *Roots*, for the Plaintiffs.

Either the will is void for uncertainty; or all the bequests, beyond the gifts for life to the children, are contrary to the rules and policy of our law. The purpose of the testatrix seems to have been, to create an infinite succession

succession of life estates; but that is a purpose which she cannot be permitted to carry into effect.

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Mr. *Lynch*, for *William Hayes*, one of the sons and the administrator of the testatrix.

It must be admitted, that, at all events, the ultimate gift to the lawful heirs of the testatrix is too remote; for it is a gift in remainder expectant upon the death of unborn children, and, therefore, not necessarily within the compass of lives in being and twenty-one years afterwards. *Jee v. Audley*. (a) Then the most favourable construction, which can be put on the prior part of the will, is this: each of the seven children of the testatrix takes a life interest in an aliquot proportion of the dividends of the stock, with survivorship among them, so that the survivor of all the seven shall take the whole of the dividends during his or her life: on the death of the survivor, the share of each of them goes to his or her children, if there be such children, for their lives: the children of the children were not intended to take more than a life interest, for the testatrix gives the fund to others after their decease, and there are no words to carry over the share of the children of one child, at their deaths, to the surviving children of any other child: therefore, upon the death of the children of the testatrix, the shares of such of them, as have no children then living, go to those who are now the next of kin of the testatrix; and the shares of such of them, as have children then living, go to the same next of kin at the death of those children.

Mr. *Fonblanque*, for the grandchildren.

The gift to the grandchildren is contained in the direction "that they are to succeed severally to the annuity

(a) 1 Cox, 324.

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annuity of their deceased parent upon their producing a legal claim to it, which must hereafter be assured to them by a proper deed of settlement." Stock in the 3 per cent. consols is properly described as an annuity; and the words are sufficient to pass the absolute interest. The gift over is clearly void, and cannot operate to cut down the prior bequest. The validity of a devise to persons *in esse* for their lives, and, after their deaths, to their children, whether born or not born at the testator's death, cannot be questioned.

Even if the words are considered as giving only a life interest to the grand-children, the bequest will be valid to that extent. A gift for life to the unborn child of a person *in esse* is good; and there is no authority for holding such a gift to be void. Its validity cannot depend on the mode, in which the ultimate interest in the fund is disposed of.

April 24.

The case was again argued.

Mr. *Fonblanque* contended, that the gift for life to unborn persons was not vitiated by the invalidity of the subsequent contingent limitation; and that the only effect of the remoteness of that limitation was, that, immediately on the death of the testator, the ultimate interest devolved to his next of kin, subject to vested life interests in his children, and contingent life estates to unborn grandchildren. He cited a passage from *Fearn*, where that author, after referring to *Manning's* case (a), and *Lampet's* case (b), says (c), "In both the above cases, the devise over was to a person *in esse*, and ascertained. But the principle, upon

(a) 8 Rep. 95.

(b) 10 Rep. 46.

(c) Page 403.

upon which the decisions proceeded, had no relation at all to that circumstance; and, therefore, we find the same doctrine holds in cases where the ulterior devisee is not *in esse*, or not ascertained. Thus, where a termor ~~for~~ years (a) devised the term to his wife for eighteen years, and after to his eldest son for life, and after to the eldest issue male of that son for life; though the son had not any issue male at the time of the devise and death of the testator; yet it was held, that, if he had had issue male at his death, such issue male should have had it as an executory devise; for that notwithstanding its being a contingency upon a contingency, and the issue not being *in esse* at the time of the devise, yet, inasmuch as it is limited to the son but for life, it is good."

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The purpose of the will is to give the dividends of the 5000*l.* stock in stated proportions amongst the seven children for their respective lives, with benefit of survivorship between them, and, after the death of the survivor of the seven children, then to give the annuity originally intended for each of the seven children, equally between their respective children for their respective lives, with like benefit of survivorship between them; and, after the death of the survivor of the children of the seven children, then the dividends of the 5000*l.* stock are to devolve in annuities upon the lawful heirs of the testatrix for ever. When this latter limitation is considered with reference to the beginning of the will, where it is said, "that the 5000*l.* stock must, for every good and substantial reason, ever remain there, an undivided fund, so long as the 3 per cent. consols may exist," it may be inferred, that the testatrix's intention was, that the persons, whom she meant to describe

as

(a) *Cotton v. Heath*, 1 *Roll. Ab.* 612. 1 *Eq. Ab.* 191.

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as her lawful heirs at the death of the survivor of her grandchildren, were to enjoy, not the capital of the stock, but the dividends only, which, after their deaths, were to descend to other persons then answering the same description. At all events it is plain, that the persons she meant to describe were not those who would answer the description at her own death, but were those who would answer the description at the death of her surviving grandchild.

The true effect of this will is, therefore, a limitation to the seven children for life, with remainder to their children, whether born or unborn at the death of the testatrix, for their lives, with a contingent remainder over to persons who shall answer a particular description at the death of the surviving grandchild. This is plainly too remote. You cannot limit to an unborn person for life, unless the remainder vests in interest at the same time. The gift to the children of the children is therefore void, and the seven children, who take life interests under the will, being the next of kin, are entitled to the remainder as undisposed of. *

The

* In *Lord Deerhurst v. The Duke of St. Alban's* (a), which arose upon a bequest of chattels to trustees, upon trust, after the decease of the survivor of the testator's wife and son, for such person as should from time to time be Lord Vere, Sir John Leach, Vice-Chancellor, said (b), "The son and grandson of the testator were living at his death, and were both, therefore, limited to the use and enjoyment only; but the child, who succeeded the

grandson as Lord Vere and Duke of St. Alban's, was not living at the death of the testator, and could not, therefore, by the rules of law and equity be limited to the use and enjoyment only."

In the argument in that cause, the rule contended for on behalf of some of the defendants was the following (c), "You may give to a person unborn an estate for life, but you cannot engraft a succession on that life estate; nor give

(a) 5 *Mad.* 232.(b) 5 *Mad.* 278.(c) 5 *Mad.* 269.

The decree was as follows: — “His Honor doth declare, that all the gifts of the 5000*l.* stock by the will of *Anne Thomas Hayes* the testatrix, subject to the life interests of her children, are void; and doth declare that the Plaintiffs *Philip Hayes, &c.* and the Defendant the Rev. *William Hayes*, the seven children, and only next of kin of the said *Ann Thomas Hayes*, are entitled to the said 5000*l.* stock,” &c.

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give to two generations of unborn persons in succession.” The counsel on the other side seem to have admitted, that, if there be a gift to an unborn son for life, with subsequent limitations over, the gift for life may be good, though the subsequent limitations are too remote. See Mr. *Sugden*’s reply, 5 *Mad.* 273.

In *Beard v. Westcott* (a), there was a demise to *John James Beard* for ninety-nine years, if he should so long live, remainder to his first son for ninety-nine years, if he should so long live, with

remainders over to other unborn persons: *John James Beard* had no child at the testator’s death: and it was held both by the Common Pleas and the King’s Bench, that the limitation of an estate for ninety-nine years to the first son of *John James Beard*, determinable with his life, was valid, but that the subsequent limitations were too remote.

See also *Humberston v. Humberston* (b), *Somerville v. Lethbridge* (c), *Robinson v. Hardcastle* (d), and *Sugden*’s edition of *Gilbert on Uses and Trusts*, p. 268.

(a) 5 *Taunt.* 393. and 5 *B. & A.* 801.

(b) 1 *P. Wms.* 332.

(c) 6 *T. R.* 215.

(d) 2 *T. R.* 781.

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March 13, 14.

By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: Held, that the covenant bound only such real estate as he should die seised of;

That the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime;

That children living at the death of the husband were alone entitled to the benefit of the covenant.

NEEDHAM v. SMITH.

MR. JOHN NEEDHAM, upon his marriage with a second wife, settled a freehold estate, part of his property, to the use of himself for life; with remainder to the intent that his wife, if she survived him, might receive an annuity of 60*l.* during her life; with remainder to all his children, whether by his first wife or by his then intended wife, as tenants in common in fee. The settlement contained also the following covenant: "And the said *John Needham*, in consideration of the said marriage, and for other the considerations aforesaid, for himself, his heirs, executors, and administrators, doth hereby further covenant, promise, grant, and agree, to and with the said *Charles Dodsworth* and *James Butler*, their heirs, executors, and administrators, that, in case the said intended marriage shall take effect, and there shall be any issue of such marriage, then and in such case he, the said *John Needham*, shall and will, by his last will and testament or otherwise, give, devise, and bequeath all other his real estates, and also all his personal estate and effects, whatsoever and wheresoever, unto and amongst all and every the children of his body, whether born of the body of his late wife *Hester*, or to be born of the body of the said *Anne Burton* his intended wife, and their heirs, executors, and administrators respectively, according to the nature or quality of such his estates, share and share alike, as tenants in common and not as joint tenants, except such part or parts thereof as he may hereafter give, devise, or bequeath unto, or to the use of the said *Anne Burton*."

At

At the date of the settlement four children of the first marriage were living: and, by the second wife, Mr. *Needham* had six children.

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Some time after his second marriage, Mr. *Needham* entered into a contract to sell to *John Kirkman* freehold property, to a part of which he was entitled at the time of the settlement, and other part of which he had subsequently acquired. The purchaser objecting to the title, on the ground of the covenant in the settlement, Mr. *Needham* filed his bill in the Court of Chancery for a specific performance of the contract. On the hearing of that cause, the Vice-Chancellor sent a case to the Court of King's Bench: and in that case, which stated that there were children both of the first and of the second marriage then living, the question for the opinion of the Court was, "Whether, in case *John Needham* should depart this life, leaving such children as aforesaid, without having procured a re-conveyance of the lands and tithes so sold and conveyed to *John Kirkman*, so that he should be unable, by his last will or otherwise, to give, devise, or bequeath the same to and amongst his children, he would be guilty of a breach of the covenant entered into by him in his said settlement, to give, devise, and bequeath, by his last will or otherwise, all other his real estate as therein mentioned."

Upon this case, which is reported under the name of *Needham v. Kirkman* (a), the Judges certified, that, in the event mentioned, Mr. *Needham* would not be guilty of a breach of the covenant.

Robert, the eldest of the sons of Mr. *Needham* by his first marriage, having died intestate in his father's lifetime,

(a) 5 Barn. & Ald. 531.

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time, his expectant share of the settled estate descended to his next brother, *Edward*, who afterwards died also in his father's lifetime, having devised the share so descended to him, as well as his own original expectant share, to his father in fee.

Elizabeth, a daughter of the first marriage, married, and died in her father's lifetime, leaving an infant son.

Mr. *Needham* survived his second wife; and by his will devised the two shares of the settled estate, which had been devised to him by his deceased son *Edward*, to a trustee upon certain trusts, under which none of his children, except one, took any benefit. At his death, there were five children of the second marriage alive, and one child of the first marriage.

The bill was filed by the surviving children of the second marriage, to have the benefit of the covenant with respect to these two shares of the settled estate.

There were two questions in the cause :

First, Whether the devise of the two shares of the settled estate, which the father derived from his son, was a breach of the covenant in the settlement :

Secondly, Whether the covenant was to operate for the benefit only of children who were alive at the death of the father, or also of the representatives of children who died in his lifetime.

Mr. *Preston* and Mr. *Temple*, for the Plaintiffs.

In *Needham v. Kirkman* (a), the Court of King's Bench decided, that this covenant did not bind the property

(a) 3 Barn. & Ald. 531.

perty which the settlor had at the date of the deed, or property which he acquired subsequently. That decision must have proceeded on the principle, that the covenant bound *only* the lands of which he should die seised: and unless it bound them, it could have no operation. The covenant, therefore, extended to all the real estates of which he should die seised, other than the settled estates — that is, to all the real estates of which he should die seised: for the settlement gave him no devisable interest in the freeholds which were comprised in it. When he subsequently acquired the remainder in fee of two of the shares of the lands comprised in the settlement, his interest in these shares was an interest which had not been made the subject of the settlement; and every interest, existing in him at the time of his death, which was not the subject of the settlement, was necessarily bound by the covenant. *Prebble v. Boghurst.* (a)

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The only objects of this covenant are the children: and those children alone can claim the benefit of it, to whom he could have devised the property — that is, children living at his death. The words — “or otherwise” — do not vary the construction. The father could not have given a share of these lands to some of the children in his lifetime, in fraud of his covenant; and he could not have devised to a deceased child, or to the representatives of a deceased child. The covenant created a trust, with a power superadded: and it must receive the same construction as would be given to a power of appointment. At all events, it is of little importance how or to whom the father might have given otherwise than by will; he has not attempted to give in any other manner than by will; and the covenant must

operate

(a) 1 *Swanst.* 309. 580.

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operate exclusively for the benefit of those who alone were the objects of that power, which, at the moment of his death, the father possessed.

Mr. *Whitmarsh*, for the devisee in trust.

Mr. *Pepys*, for the child, who claimed beneficially under the devise of the father.

In *Needham v. Kirkman*, the Court of King's Bench decided nothing more than this, — that the covenant did not affect property, being no part of the settled estate, which the settlor alienated in his lifetime. That decision does not touch the question, whether the covenant affects a share of the settled estate, which the settlor derived subsequently from the gift of those who acquired their interest solely under the settlement. The deed of settlement describes certain real estates, and treats a series of limitations with respect to them, after which the settlor covenants to give and devise, by his last will or otherwise, all other his real estates — that is, all estates other than those previously described. The plain interpretation of the words protects the lands in question, which are not *other* than the lands specified in the deed, but are a portion of those very lands, from the operation of the covenant.

Mr. *Tamlyn*, for the son and heir of the deceased daughter, argued that he, as the representative of his mother, was entitled to a share of that portion of the settled estate which Mr. *Needham* had devised.

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This point has, in fact, been decided by the Court of King's Bench. The only ground, upon which their judgment could have proceeded, is, that the covenant in question

question neither bound the real estate of which Mr. *Needham* was seised at the time of the settlement, nor any subsequently acquired real estate, unless it continued to be his property at the time of his death: and to that conclusion I should have come, without the advantage of this prior decision. All real estate, of which he was seised at his death, is bound by his covenant.

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SMITH.

A distinction has been taken in the argument, because the property, thus devised, consisted of the shares of two of the sons in the settled estate. There is certainly some singularity in the circumstance; but what difference can it make in principle? The father being bound by his covenant to give equally to all his children such property as he should be entitled to at his death, the manner, in which he acquired that property, must be wholly indifferent.

The children at the death of the father are to take by his gift, and must necessarily be children living at his death, and then capable of taking. The heirs of the children, who died in the lifetime of the father, can have no benefit from this covenant; and it makes no difference that one of these children left a child. It is true that the words of the covenant are, that the father is to give by his will or otherwise: but he could not in any manner have conferred an interest, under the covenant, upon the representatives of a child not living at his death.

In consequence of permission given by the Court, upon an application made on behalf of the infant son of the deceased daughter, the last point was argued a second time.

March 13.

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 NEEDHAM
 v.
 SMITH.

Mr. *Tamlyn* cited *Emperor v. Rolfe* (a), *Cholmondeley v. Meyrick* (b), *Hope v. Lord Clifden* (c), and *Bradish v. Bradish*. (d) In the last of these cases, he argued, a marriage settlement provided, that, if the husband and wife should both die, leaving one or more children, a sum of 600*l.* should go to the use of those children in such manner and shares as the father should, by his last will, or any other deed, appoint; and the husband covenanted that one half of whatever substance he should be seised or possessed of at the time of his death, beyond the 600*l.*, should immediately go to such child or children. The decree declared (e), that all the children of the marriage (including some who died in the father's lifetime) were entitled to the benefit of the covenant. On the same principle, the covenant in this settlement must operate in favour of the daughter who died in Mr. *Needham's* lifetime, as well as of the children who survived him.

Mr. *Preston*, *contra*.

The doctrine of the cases which have been cited is merely this; that the Court, in favour of a general intention appearing on a settlement, has held that portions vested in the children, and were not divested by their dying in the father's lifetime, though there were words in the instrument, which, taken literally, seemed to imply, that those children only, who survived the father, were to share in the fund. That doctrine has no application to the present case. If the decree of Lord *Manners* in *Bradish v. Bradish* goes further, it is not warranted by any principle of decision or by any class of authorities.

March 14. The MASTER of the ROLLS confirmed the judgment which he had pronounced before.

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|--|-----------------------------------|
| (a) 1 <i>Ves.</i> sen. 208. | (c) 6 <i>Ves.</i> 499. |
| (b) 3 <i>Bro. C. C.</i> 253. in the
note, and 1 <i>Eden</i> , 77. | (d) 2 <i>Ball & Bea.</i> 489. |
| | (e) 2 <i>Ball & Bea.</i> 491. |

1828.

CLIFFORD v. BEAUMONT.

ROLLS.

March 10.

THE testator, Sir *Thomas Blackett*, by his will, among other things, gave to his daughter *Louisa* a legacy of 10,000*l.*, "payable and to be paid to her in manner following; that is to say, the sum of 5000*l.* upon her marriage, (with such consent and approbation as aforesaid,) and the sum of 5000*l.* within two years afterwards." The consent and approbation referred to was expressed in a former part of the will, where certain real estates were devised in remainder to the use of the daughter *Louisa*, "or such person as she shall first intermarry with, if any, (if, before she attain the age of twenty-one, by and with the consent and approbation of *John Erasmus Blackett* and *Thomas Cotton*, or the survivor and his heirs, and which person shall also previously make a competent settlement on her my said daughter *Louisa*, by deed or deeds in writing, to the like approbation of the said *John Erasmus Blackett* and *Thomas Cotton*), &c."

A testator gave to his daughter a legacy of 10,000*l.*, "payable and to be paid unto her in manner following, viz. a sum of 5000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5000*l.*, within two years afterwards." The daughter married under twenty-one, without consent of the trustees; and, her first husband dying, she married a second husband at the distance of thirty years from her first marriage: *Quære*, if, on such second marriage, she became entitled to the 10,000*l.*

The daughter *Louisa*, now the Plaintiff *Mrs. Clifford*, intermarried, before she attained twenty-one, with Mr. *Stackpole*, without the consent and approbation required: and afterwards, she, with Mr. *Stackpole*, filed their bill in this Court, claiming the legacy of 10,000*l.*, and the other provisions made for her by the will. In that suit, which came on to be heard before Lord *Rosslyn*, and is reported under the name of *Stackpole v. Beaumont* (a), it

was

(a) 3 *Ves.* 89. In that report, the will, on which the question arises, is stated at length.

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 CLIFFORD
 v.
 BEAUMONT.

was declared, that she was not entitled to the legacy of 10,000*l*.

Mr. *Stackpole* the husband having died, the Plaintiff Mrs. *Clifford*, at the distance of about thirty years from the first marriage with Mr. *Stackpole*, intermarried with the Co-plaintiff Mr. *Clifford*; and the present bill was filed, claiming the legacy of 10,000*l*., upon the ground that the legacy was payable to her upon marriage generally, and that the consent and approbation required applied only to a marriage under twenty-one.

Mr. *Sugden* and Mr. *Lynch*, for the Plaintiffs.

The testator has bequeathed to his daughter *Louisa* 10,000*l*., of which 5000*l*. is to be paid on her marriage, and the remainder two years afterwards; but he provides by a parenthetical clause, that, if she marries under twenty-one, the marriage must be with the consent of certain persons. She married under twenty-one without the required consent. Marriage under that age, without consent, was not such a marriage as entitled her to receive the legacy; and so Lord *Rosslyn* held. Now the state of circumstances is altogether different; and the question raised is one which that Judge could not consider. The lady, having long since attained twenty-one, has married Mr. *Clifford*; and that marriage entitles her to the legacy.

If for the words ("with such consent and approbation as aforesaid") we substitute the preceding clause to which they refer, the bequest will run thus:—"I give 10,000*l*. to my daughter *Louisa*, to be paid to her in manner following; that is to say, the sum of 5000*l*. upon her marriage (if before she attain the age of twenty-one, by and with the consent and approbation
of

of *John Erasmus Blackett* and *Thomas Cotton*), and the sum of 5000*l.* within the two years next afterwards." The effect of the words, according to their natural and grammatical construction, is — not to limit the bequest to the event of the legatee's marrying under twenty-one — but to annex a condition to the gift, in the event of the marriage taking place during infancy. It is not a very probable intention to impute to a testator, nor one very consistent with the scheme of this will, to suppose that the daughter was not to receive the legacy, unless she married under twenty-one.

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The argument in *Stackpole v. Beaumont* turned exclusively on the effect of the annexed condition in the event of marriage under twenty-one; and Lord *Rosslyn* speaks of the condition as operating only up to that age. He states the question to have been, whether the lady had put herself in a situation to answer the description of the person to take; and he decided that she had not done so. But, in the altered state of circumstances which now exists, the event has happened, on which the legacy was given to her; for the money was to be paid to her on her marriage; and, the age of twenty-one being attained, the condition, which affected marriage during her minority, has no operation.

Mr. Horne, Mr. Pepys, and Mr. Knight, contrd.

The legacy is expressly directed to be paid on marriage with the specified consent and approbation; and the argument on the other side is, that it is to be paid merely on marriage. That construction strikes out plain and important words. There is no necessity that the condition, requiring consent and approbation, should be limited to marriage during the infancy of the legatee; but if it be so limited, what could be a more probable

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probable intention than that the testator should have said, "I give you a certain legacy, if you marry before twenty-one, with the approbation of those in whom I have reposed confidence; but you shall not enjoy that benefit, if you marry without their consent, whether such marriage takes place without their approbation during the period to which their authority extends, or after that period has expired." If the daughter *Louisa* did not become entitled, when her first marriage took place, it is a fantastical construction to say, that her second marriage, thirty years afterwards, can give her a new right.

The MASTER of the ROLLS.

I cannot read the judgment of Lord *Rosslyn* in the case of *Stackpole v. Beaumont*, without coming to the conclusion, that the principle, upon which he decided that case, necessarily determines the present question. His opinion plainly was, that the legacy was given to the lady only in the event of her marrying under twenty-one, with the consent and approbation of his trustees, and that, such consent not having been given, she could not be entitled to the legacy. It would not become this Court to adopt a different conclusion, unless it considered the case very clear the other way; and I cannot say that it is clear that the testator meant to give the sum generally as a marriage portion, with this restriction only, that a marriage under twenty-one should not entitle her to it, unless it were had with the consent and approbation of his trustees. This is certainly not the natural effect of the language he has used; and he may well have intended this legacy as a bounty upon a marriage with consent under twenty-one. I must leave the parties, therefore, to review Lord *Rosslyn's* judgment, if they think fit, before a higher tribunal.

Bill dismissed without costs.

1828.

ATTORNEY-GENERAL *v.* MULLAY.

ROLLS.
March 10.

THIS was an information filed by the Attorney-General, under the 4 G. 4. c. 76. s. 23., for the purpose of having it declared, that the Defendant had in this case incurred a forfeiture of all interest in the present or future property of his wife, by reason that, in order to obtain the licence under which the marriage was solemnized, he had taken a false oath that the wife was of age, though, in fact, she had not completed her twenty-first year. It further prayed, that the wife's present and future property might be settled and secured for the benefit of herself and the issue of the marriage.

Where the husband incurs a forfeiture, under the twenty-third section of 4 G. 4. c. 76., the Court has no discretion to mitigate the penalty, but is bound to settle and secure all property, present and future, of the wife, for the benefit of herself or the issue of the marriage.

It was not disputed, that the facts, which brought the case within the act, were fully proved.

Mr. Sugden and Mr. Lovat, for the information.

Mr. Pemberton, for the husband.

A discretion is to be exercised, as to whether the offending party shall suffer the penalties to which the act makes him liable. It was not the intention of the legislature, that those penalties should be inflicted in every case. Certain requisites are prescribed, without which an information shall not be filed; but it is not made imperative on the Attorney-General to file an information, wherever those requisites exist. Whether the offending party is or is not to suffer the penalties, cannot depend on the mere chance of whether the Attorney-General shall or shall not choose to file an information. The filing of the information gives the Court

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v.
MULLAY.

Court jurisdiction, but that jurisdiction the Court is to exercise according to its own discretion. The act does not require a forfeiture to be declared; the words are, that the "Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property, as shall then have accrued, or shall thereafter accrue, to such offending party by force of such marriage, shall be secured under the direction of such Court, for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage." The Court, therefore, ought not to hold itself bound to declare a forfeiture, but will consider, whether it would not be reasonable, looking at the circumstances of the parties, their age, and their situation, to direct a settlement of the wife's fortune to be made upon principles similar to those on which it acts towards a husband who has married a ward without the sanction of the Court.

Mr. *Phillimore*, for the wife.

The MASTER of the ROLLS stated, that, it not being disputed that the fact was fully proved, which brought the case within the provisions of the 4 G. 4. c. 76., the Court had no discretion given to it by the act to mitigate the penalty, but was bound to declare the forfeiture in the words of the act, and to refer it to the Master to inquire what estate, right, title, or interest in any property the wife was entitled to at the marriage, or had subsequently acquired, and to secure the same under the direction of the Court; and also to refer it to the Master to approve of a proper settlement of such property and
all

all future property which the wife might acquire during the coverture, for the benefit of the wife or the issue of the marriage, or either of them.

Decree accordingly.

1828.

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v.
MULLAY.

FRANCIS v. COLLIER.

ROLLS.

March 10.

THE testator, *Joseph Shepherd*, by his will devised certain freehold property to his daughter *Hannah* for life, with remainder to her children, in manner therein mentioned; and he directed, that, after *Hannah's* death, the freehold property, in case she left no child who should become entitled to it under the limitations contained in his will, should be sold by his trustees, and the produce applied upon the trusts, intents, and purposes thereafter expressed of and concerning his residuary personal estate. By a subsequent clause in his will, he gave his residuary personal estate upon certain trusts, for the benefit of six of his daughters and their husbands and children, including his daughter *Hannah*, but excluding altogether a seventh daughter of the name of *Sarah*.

A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil, he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate.

The testator by a codicil, executed and attested so as to pass freehold estates, altogether revoked the bequest in his will of his residuary personal estate, and directed such residuary personal estate to be divided into seven parts, and gave six of such parts absolutely to the six daughters named in the residuary clause in his will; and the other seventh part he gave to trustees, upon certain trusts, for the benefit of his daughter *Sarah* and her children.

The

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 FRANCIS
 v.
 COLLIER.

The daughter *Hannah* survived the testator, and afterwards died, leaving no child to take the benefit of the provisions in the will as to the freehold property devised to her for life: and the question in the cause was, whether the produce of that freehold property, which, in the events that had happened, had been sold according to the directions of the will, was or was not to be considered as passing under the codicil by the revocation of the residuary clause in the will, and by the effect of the new residuary clause contained in the codicil.

Mr. *Pepys* and Mr. *Jeremy*, for the Plaintiffs, argued, that the produce of the real estate was to be applied according to the trusts expressed in the will, and was not affected by the codicil; and they cited *Gallini v. Noble*. (a)

Mr. *Bickersteth* and Mr. *Knight*, *contra*.

The trusts declared in the will concerning the personal estate are annihilated by the codicil, as completely as if the words expressing them had been obliterated. The operation of the codicil is, that the will, taken by itself, and as distinguished from the codicil, contains no operative trusts of the residuary personal estate; those trusts are to be found only in the codicil; and, the codicil being, in effect, a part of the will, and the trusts of the produce of the real estate being indentified with the trusts of the residuary personal estate, the produce of the real estate must pass according to the trusts contained in the codicil.

Mr. *Simons*, Mr. *Phillimore*, Mr. *Collinson*, and Mr. *Lynch*, for other Defendants.

The

(a) 3 Mer. 691.

The MASTER of the ROLLS.

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COLLIER.

When the will gives the produce of this freehold property upon the trusts, intents, and purposes which were expressed in the will as to the residuary personal estate, the effect is the same as if those trusts, intents, and purposes had been immediately repeated, and applied in terms to the produce of the freehold estate. If such had been the case, it is obvious that the revocation, by the codicil, of the residuary gift of the personal estate by the will, would have been no revocation of the disposition of the produce of the freehold estate; and it can make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents, and purposes by compendious words of reference. The produce of the freehold estate remains, therefore, unaffected by the codicil, and must still be applied upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate.

1828.

ROLLS.

March 15.

DOWNES v. TIMPERON.

A *feme covert*, described as such in the will of the testator, may, during the coverture, execute by deed a power of disposition, given her by the will, over real and personal estate.

THE testator, *George Kinghorn*, by his will, *inter alia*, gave to his daughter *Ann Downes*, whom he described as the wife of the Plaintiff, *J. J. Downes*, and to her heirs, executors, administrators, and assigns, a legacy of 2000*l.*, the fee-simple of a certain real estate in the island of *Jamaica*, and one third part of all the residue of his estates, real, personal, and mixed, and of what nature or kind soever. By a codicil he declared, that it was his will, that, if the said *Ann Downes* should depart this life without disposing, by deed or will, of such estate or interest as she should take under his will, then such estate and interest should go and be divided between and amongst her children, share and share alike, with benefit of survivorship.

After the death of the testator a settlement was made, to which *Ann Downes*, and her husband, and two persons, named as trustees, were parties, whereby, after reciting the will and codicil of *George Kinghorn*, *Ann Downes*, with the privity and approbation of her husband, and in virtue of the power and authority given to her by the will of her father, limited and appointed all such estate and interest, as she took under her father's will, to the trustees therein named, upon trust, for the sole and separate use of her the said *Ann Downes* during her life, remainder to her husband for his life, if he should survive her, with remainder to the children of the marriage, in the manner therein mentioned.

The

The question at the hearing of the cause was, whether the settlement so made was a good execution of the power of disposition given to *Ann Downes* by the codicil ; it being contended that *Ann Downes*, as a married woman, was not capable of executing a power by deed during the life of her husband.

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 DOWNES
 v.
 TIMPERON.

The case stood over to look into authorities on that point.

On a subsequent day, Mr. *Sugden* contended, that the words of the codicil gave the wife a power, and that the power was well executed by the settlement. In support of the latter proposition, he cited *Rich v. Beaumont*. (a)

Mr. *Horne* and Mr. *Lovat*, *contra*.

Mr. *Bickersteth* and Mr. *Teed*, for formal parties.

The MASTER of the ROLLS gave his judgment in favour of the settlement ; referring to the cases of *Rich v. Beaumont* (b), *Tomlinson v. Dighton* (c), and *Peacock v. Monk*. (d)

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|--------------------------------|----------------------|
| (a) 5 Bro. P. C. 308. See | (c) 1 P. Wms. 149. |
| <i>Sugd. on Pow.</i> 156, 157. | (d) 2 Ves. sen. 191. |
| (b) 3 Brown, Parl. Cas. 308. | |

1828.

ROLLS.

SELBY v. SELBY.

If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate.

Quære. If a pecuniary legatee would be entitled to the same benefit against the devisee?

IN *January* 1819, *Thomas Selby*, by his agent, contracted for the purchase of certain tithes at the price of 900*l.*, and paid 90*l.* by way of deposit. In the following *October* he republished his will, by which he devised all his tenements, tithes, hereditaments, and real estate. He died in *March* 1821, without having completed the contract.

The suit was instituted for the establishment of his will, and the administration of its trusts.

In *November* 1824, the executrix, pursuant to an order of the Court, paid 810*l.*, the residue of the purchase-money, and 231*l.* 1*s.* for interest, out of a sum of 1043*l.* which had remained in the hands of the testator's bankers, and was found by the Master to have been left specifically applicable to the payment of the purchase-money for the tithes.

By the Master's general report it appeared, that the simple contract debts of the testator amounted to 4100*l.*, and that the only assets, applicable to the payment of those debts, consisted of so much of a sum of 691*l.* in the hands of the executrix, as should remain after payment of the subsequent costs of the suit.

Under these circumstances the executrix presented a petition, insisting that, as the vendor had a lien on the tithes for the residue of the purchase-money, the 1041*l.*, which

which had been paid out of the personal estate in satisfaction of his demand, should be raised out of the tithes for the benefit of the simple contract creditors.

1828.

SKELBY.
v.
SELBY.

The petition came on with the hearing of the cause on further directions.

Mr. *Purvis*, for the petition.

Mr. *Starrow*, for the devisees, contended, that the lien of the vendor was extinguished by the payment of the purchase-money; that third persons could not insist on that equity which the vendor might have enforced; and that there was no precedent for marshalling the purchased property and the personal estate (*a*), as between creditors and devisees.

The MASTER of the ROLLS.

The testator, *Thomas Selby*, had, in his lifetime, contracted to purchase certain tithes for a sum of 900*l.*, and had thereupon paid the sum of 90*l.* by way of deposit. The purchase was not completed at the time of his death, but was afterwards completed under an order of the Court made in this suit, and the remainder of the purchase-money was paid out of his personal estate. The testator had made his will prior to this contract, whereby he devised all his real estates in manner therein mentioned: and, after the making of the contract, he re-published his will, so that his equitable interest in the purchased tithes passed thereby. The question is, whether, there being a deficiency of the testator's personal

(*a*) See *Sugd. on Vendors and Purchasers*, 531—537.

1828:

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v.

SELEY.

personal estate to pay his simple contract debts, the assets are so to be marshalled, that, to the extent to which the personal estate has been applied in payment of the residue of the purchase-money for the tithes, the simple contract creditors are entitled to the advantage of the lien which the vendor of the tithes had upon the property so contracted to be sold by him.

The cases cited are *Pollexfen v. Moore* (a), *Coppin v. Coppin* (b), *Trimmer v. Bayne* (c), *Mackreth v. Symmons* (d), *Headley v. Readhead* (e), *Austen v. Halsey*. (g) In *Pollexfen v. Moore*, Lord Hardwicke is reported to have stated, that the lien of a vendor does not prevail for the benefit of a third person: yet his decree was, that a legatee in that case was entitled to the benefit of the lien of the vendor. In that case, as in this, the purchased estate was devised. Many observations have in subsequent cases been made with a view to reconcile the *dictum* and decree of Lord Hardwicke: but, I must admit, without success. In the case of *Coppin v. Coppin*, the purchased estate was not devised by the purchaser, but descended to his heir: and the question there was between the heir and legatees; and the Court refused to marshal the assets in their favour. In the case of *Trimmer v. Bayne*, Sir William Grant, after referring to the *dictum* of Lord Hardwicke in *Pollexfen v. Moore*, and stating that he had been much perplexed by that case, comes to a conclusion directly opposed to that *dictum*, and expressly states, that the lien of a purchaser is within the common principle of marshalling assets — that a person, having power to resort to two funds, shall not, by his election, disappoint

(a) 5 Atk. 272.

(b) 2 P. Wms. 291.

(c) 9 Ves. 209.

(d) 15 Ves. 344.

(e) *Cooper's Rep.* 50.

(g) 6 Ves. 475.

disappoint another having one fund only. The purchased estate in that case had descended to the heir; but it does not appear by the report with what class of claimants the heir was contending—whether with simple contract creditors, or with legatees. *

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v.
SELBY.

* In *Trimmer v. Bayne*, it appeared by the report of the Master, that the net produce of the real estates of the testator, and of the rents, profits, and by-gone accumulations thereof, after deducting 11,660*l.* 10*s.* 10*d.*, the amount of his debts due by specialty, and of the costs and charges attending the sale, or otherwise relating to the testator's real estate, was 3630*l.* 13*s.* 1*d.*† The legacies, with interest up to the 22d of Aug. 1803, amounted to 8732*l.* 17*s.* 6*d.*

There was standing to the credit of the cause a sum of 658*l.* 7*s.* 3*d.* three per cent. Bank Annuities; and there stood to the account of the personal estate 13,706*l.* 7*s.* 9*d.* like stock, and a small sum of cash.

The order on further directions provided for the payment of the costs out of the 658*l.* 7*s.* 3*d.*, and directed that it should be referred to the Master to compute subsequent interest on the legacies, and that what should be found due to the legatees should be paid out of the funds standing to the account of the personal estate, but in case the fund should not be sufficient to pay them all in full, then the fund was to be apportioned among them rateably.

Reg. Lib. 1803. B. 222. 229.

It therefore appears that the heir was contending with legatees.

The

† This is the precise sum, which (in 9 *Ves.* 209.) is stated to be the amount of the claim of the heir-at-law against the personal estate, in respect of specialty and simple contract debts, and the purchase money of real es-

tates contracted for by the testator before his death, which had been paid out of the money produced by the sale of the testator's real estate. In that respect, the report seems to be inaccurate.

1838.

SALBY
v.
SALBY.

The case of *Headley v. Redhead* is very imperfectly reported. It was, however, the case of a devise of the purchased estate, and Sir *William Grant* plainly meant to confirm the general principle as to marshalling, which he had stated in *Trimmer v. Bayne*. In *Austen v. Halsey*, an estate contracted to be purchased was devised; and a question was made, whether the legatees would, to the extent of the vendor's lien, be paid out of the purchased estate. Lord *Eldon* is reported to have stated, that the cases of marshalling seem to have gone this length, that, where there is a charge upon an estate descended, a legatee shall stand in the place of a person having that charge and resorting to the personal estate, but that there was a difference in marshalling between an estate descended and an estate devised; and that it might be found difficult for the legatees to work out their payment by that circuitry. In that case, however, there turned out to be a personal fund for payment of the legacies; and Lord *Eldon* expressly disclaimed giving his opinion upon the point.

I believe I have referred to all the authorities which apply to the particular point in question here. I confess I am unable to discover, upon what principle Lord *Hardwicke's dictum*, that the lien of a vendor is not to prevail for the benefit of a third person, is to be supported — why, in this case alone, an exception is to be made to the equitable rule, that he, who has power to resort to two funds, shall not, by his election, altogether disappoint another person who has power to resort to one fund only. I concur entirely, therefore, with the expressed opinion of Sir *William Grant* in *Trimmer v. Bayne*: and it may fairly be observed, that what Lord *Eldon* has stated in *Austen v. Halsey* affords the inference, that the vendor's lien is subject to the general principle of marshalling. Here the question is between devisees of the purchased estate
and

and simple contract creditors ; and, — the established rule being, that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors who have exhausted the personal assets, because the specialty creditors had the two funds of real and personal estate to resort to, — so the simple contract creditors here are entitled to stand in the place of the vendor against the devisees, because the vendor has equally a charge upon the double fund of real and personal estate.

1828.

SELBY
v.
SELBY.

If the charge of the vendor is to be considered in the same manner as if it were secured by mortgage, then a pecuniary legatee would have the same benefit from the vendor's lien : it being now the settled law of the Court, that, if the real estate devised be subject to a mortgage, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. The present case, however, does not call for a decision upon that point.

1828.

ROLLS.

March 14.

INGLEBY v. DOBSON.

A school-house, built prior to the 9 G. 2. c. 36., on waste of a manor given by the lord for that purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy.


THE testator in this case gave a sum of 2000*l.* in trust for the purpose of rebuilding or enlarging an old school-house then existing in the town of *Stokesley*, or of building a new school-house in the same parish. The surplus of the 2000*l.* was to be applied by way of emolument for a schoolmaster; and the will described the number and description of the scholars who were to be taught.

At the hearing of the cause before Lord *Gifford*, he referred it to the Master to inquire whether the old school-house, in the will mentioned, had been, in any and what manner, and by whom, appropriated to charitable purposes, and whether the same was in mortmain at the death of the testator.

The Master found that the school-house had not been appropriated to charitable purposes, and was not in mortmain at the death of the testator. To this report an exception was taken, which now came on to be heard.

It appeared upon the evidence before the Master, and the facts were not disputed, that this school-house was built, in 1734, and, therefore, two years before the statute 9 G. 2. c. 36., upon waste of the manor, which was then given by the lord of the manor for that purpose; that the expense of the building was discharged by the subscriptions of the lord of the manor and the other inhabitants of the parish; that the lord of the manor, during

during a considerable period, allowed a sum of 25*l.* a year for a schoolmaster, and that, some years afterwards, another person had given by his will 40*s.* a year towards the maintenance of the schoolmaster, though, latterly, that sum had not been paid; that the building had not been applied to any other purpose than as a school, except that the school-master had at one time occupied an upper apartment in it rent free, and that sometimes there had neither been schoolmaster nor scholars; and that the scholars, when there were any, made some payments for their instruction.

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· Very shortly before the institution of this suit, the present lord of the manor had brought an ejectment to recover the possession of the school-house from a woman who had been named schoolmistress by the parishioners, but had at the time no scholars; and she, being too poor to stand the expense of litigation, gave up the possession to the lord of the manor, who stated, in an affidavit before the Master, that he had brought such ejectment, not with a view to claim the school-house as his property, but in order to facilitate the object of the will of the testator in this cause, by putting his trustees in possession of the premises.

Mr. Bickersteth and Mr. Knight, for the exception.

Mr. Preston and Mr. Pemberton, contra.

That, for a number of years, the building has not been treated as private property, but has been occasionally used as a school, sometimes of one sort, and sometimes of another, is not a sufficient ground for the Court to say, that the land was appropriated to charity and was in mortmain at the death of the testator. No conveyance of the school-house is produced, nor any instrument shewing an appropriation of it to charity; and

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the presumption of any conveyance is repelled by the Master's report, and the circumstances stated in it. There is no declaration in writing which could create a trust; nor is there any certainty in the charitable trust which the Court is required to raise by mere conjecture. To what particular purposes is the school to be devoted? Who are to enjoy the benefit of it? What are to be the qualifications of the Master? By whom is he to be appointed? The very evidence, on which the exceptant relies, shews, that there is no certainty in the supposed charitable trust; for the building has been used sometimes as a school for boys, and sometimes as a school for girls; to-day it has been under a master; to-morrow, under a mistress; at one time the master has been nominated by the minister of the parish, at another time by the vestry. *The Attorney-General v. Hewer.* (a)

The MASTER of the ROLLS

Allowed the *exception*; stating that, upon the admitted facts, the school-house was plainly dedicated to the public purpose of a school, and was therefore a charitable establishment, and in mortmain, at the death of the testator; that no individual could claim property in it; and that, if the lord of the manor had asserted a hostile claim to it, it would have been the duty of the Attorney-General to have resisted that claim.

(a) 2 Vern. 387.

1828.

BAYLEY v. BOULCOTT.

ROLLS.

March 14.

THE Plaintiff in this case had derived a considerable property under the will of a relation, who, as to a sum of 4000*l.*, part of such property, had given her a life interest only, with remainder to the Plaintiff's daughter and only child. *Boulcott*, one of the executors of this relation, considering that it would be reasonable that the Plaintiff should make a larger provision for her daughter, to guard against the consequences of a second marriage by the Plaintiff, did, without previously consulting the Plaintiff, transfer a sum of 10,000*l.* stock, to which she was entitled under the will, from the name of his testatrix unto the names of himself and the other executor of the testatrix, with a view to make this sum the subject of a settlement upon the Plaintiff's daughter, after the Plaintiff's death. He afterwards acquainted the Plaintiff that he had made this transfer, and stated to her the object with which he had made it; and he recommended a further settlement upon the daughter accordingly. The Plaintiff on that occasion assented to the suggestion, and requested him to call upon her solicitors and give them instructions to prepare a proper deed for that purpose. The deed of settlement was accordingly prepared; but when it was brought to her for execution, she stated that she had changed her mind, and refused to sign it; and, the executors of the testatrix, into whose names the 10,000*l.* had been transferred, having declined to transfer it to the Plaintiff without the direction of a court of equity, the present bill was filed by her, in order, amongst other purposes, to obtain a transfer of this sum of 10,000*l.* stock.

Mr.

A mother, entitled to a considerable property under the will of a relation, in a conversation with the executor of that relation, expressed an intention to make a settlement of part of that property, which was standing in his name, upon her daughter, and requested the executor to instruct her solicitor to prepare such a settlement: on the prepared settlement being brought to her for execution, she had changed her mind, and refused to sign it: Held, that her intention, expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the property was personal estate.

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Mr. *Pepys* and Mr. *Barber*, for the Plaintiff, cited *Ellison v. Ellison* (a), and *Antrobus v. Smith*. (b) The stock in question, they argued, could have ceased to be the absolute property of the Plaintiff only in consequence of a trust having been created for the daughter. It was not pretended that there had been a declaration of trust by an instrument in writing; and the case of the Defendant, therefore, could not be carried higher than this, — that the transfer of the stock by *Boulcott*, with a view to a settlement on the daughter, and the assent of the mother to what he had done, did, in equity, amount to a settlement. Now, if the mother, after she was informed of the transfer of the stock, had said, “I assent to the transfer, and I declare that the stock shall be holden in trust, after my death, for my daughter,” or had made any equivalent declaration, there might have been some ground for contending that an equitable interest vested in the daughter. In fact, however, the Plaintiff made no parol declaration of trust; she only expressed an intention of executing a written declaration of trust; and having retracted her purpose before it was carried into execution, the stock remained her absolute property.

Mr. *Skirrow*, *contra*.

That which was done by the mother, amounted to a complete and irrevocable settlement of the 10,000*l.* upon the daughter, after the mother’s death. To declare a trust of personal property, writing is not necessary. The transfer of the stock into the names of the executors, and the unequivocal expressions by the Plaintiff of her intention that the stock so transferred was by way of a further provision for her daughter, created a trust in favour

(a) 6 *Ves.* 663.

(b) 12 *Ves.* 39.

favour of the daughter, which the mother cannot destroy. That trust is not affected by the circumstance that the deed, for which instructions were at one time given, was not prepared; for the deed is not necessary in order to create the trust: *Jenkin's Centuries* (a), *King v. Cotton* (b), *Fordeyce v. Willis* (c), *Nabb v. Nabb*. (d)

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It is true, that, with respect to personal property, a declaration of trust may be by parol, and that a written instrument is not necessary for that purpose. But the conversation, which took place between the plaintiff and the executor, when he acquainted her with the fact of the transfer of the 10,000*l.*, cannot be considered as being, on her part, a fixed and concluded declaration of trust in favour of the daughter.

There was, on the part of the Plaintiff, no more than an expression of her intention to make a future declaration of trust in favour of the daughter, by an instrument which she authorised the executor to have prepared by her solicitor; and, beyond the general purpose of settling the 10,000*l.* upon the daughter after her death, the particular terms of that instrument were not even the subject of consideration. This inchoate intention being merely voluntary on the part of the mother, the execution of it cannot be compelled by this Court.

Decree for the Plaintiff.

(a) *Cent.* III. Case 9.
(b) 2 *P. Wms.* 674.

(c) 3 *Bro. C. C.* 577.
(d) 10 *Mod.* 404.

1828.

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March 18, 19.

THOMAS v. PHELPS.

A gift to A. and B., "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," will pass the fee simple of real estate.

THIS was a bill filed for a partition of land claimed by the Plaintiff, late *Elizabeth Phelps*, but now married to the other Plaintiff *Thomas*, under the will of her late father. The father began his will by stating, "As touching such worldly estate, wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner." He then gave several pecuniary legacies, after which the will proceeded in these words: "I also give and bequeath the lease of the colliery of *Landigwynet* to my son *James Phelps*: him and my daughter *Elizabeth Phelps* I do make, constitute, and appoint my joint executor and executrix of this my last will and testament, of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed, of whatsoever nature or manner it may be, only my household furniture, which I give to my daughter who lives the longest single, and, after her decease or marriage, to be sold, and equally divided between my remaining children: and if my daughter *Elizabeth Phelps*, one of my executors, do, at any time ever hereafter, marry *Robert Davies*, she is to be excluded of being one of my executors, and to be cut off with one shilling."

The question in the cause was, whether, under the clause above stated, *Elizabeth Phelps* took any, and what, interest in the real estate of the testator not otherwise disposed of.

Mr. *Bickersteth* and Mr. *Wilson*, for the Plaintiffs, contended that the fee-simple of a moiety of the residuary

siduary real estate of the testator, passed by the will to the daughter *Elizabeth*. They cited *Hogan v. Jackson* (a), *Monk v. Maudsley* (b), and the authorities referred to in the argument of that case.

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Mr. *Treslove* and Mr. *Martin*, for the heir.

The gift being to *Elizabeth* only as executrix, she can take nothing but personal property. The testator makes her and *James* executrix and executor of "all that I possess;" a mode of expression wholly inapplicable to freehold estate; and the bequest is modified immediately afterwards by an exception of various personal chattels. Such expressions shew, that the testator had not real estate in his contemplation, when he framed this part of his will.

Even if the clause were sufficient to pass freeholds, there are no words of limitation which could carry the interest of *Elizabeth* beyond an estate for life. The testator, in making her an executrix of all that he possesses, cannot by these words have given her a greater interest in his real estates, than if he had devised them to her; and the direction that what is thus given her is to be freely enjoyed and possessed by her, cannot enlarge the quantum of her interest. The most extended construction, which can be put upon the will, is, that it is a devise of lands to *Elizabeth*, to be by her freely enjoyed and possessed; and such a devise would not pass the fee.

They cited the following authorities: *Clement v. Cassey* (c), *Shaw v. Bull* (d), *Piggott v. Penrice* (e),
Doe

(a) *Cowp.* 299.

(b) 1 *Sim.* 286.

(c) *Noy.* 48.

(d) 12 *Mod.* 592.

(e) *Préc. in Cha.* 471.

1828. *Doe v. Buckner (a), Doe v. Wright (b), Goodright v. Barron. (c) **
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March 19. *The MASTER of the ROLLS.*

This is the will of a person who had not the advantage of professional assistance, and was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal estate, as it regards that office. His purpose was, to make a gift to his son *James* and his daughter *Elizabeth*;

(a) 6 T. R. 610.

(b) 8 T. R. 64.

(c) 11 East, 220.

* In *Shaw v. Bull*, the testator devised part of his freeholds to his wife and her heirs, she paying his legacies, in case his goods and chattels were not sufficient to answer them; and he gave "all the overplus of his estate" to be at his wife's disposal, and made her his executrix. The words, "overplus of my estate," were considered to mean personal estate only, there being nothing in the will to fix on the word "estate" the character of comprehending real property.

In *Piggot v. Penrice* the words were, "I make my niece executrix of all my goods, lands, and chattels;" and it was held, that lands of inheritance did not pass. She was to be executrix of such lands as would belong to her in the character of executrix; and, in that case, the word "lands"

the rather received this construction, because it stood between the words "goods" and "chattels."

In *Doe v. Buckner*, the testator gave all the rest and residue of his estate and effects, of what nature or kind soever, to *Buckner* and *Robinson*, their executors and administrators, in trust that they would "from time to time add the interest thereof to the principal, so as to accumulate the same;" and it was held, that freehold lands did not pass; first, because the words "estate and effects" were limited by the words "executors and administrators;" and, secondly, because the trust to add the principal to the interest, so as to accumulate, could have no application to freehold estates, and was inconsistent with the nature of land.

zabeth; and the subject of his gift is, "all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be." These words are equivalent to a gift of all his property; and a gift of all property will not only pass real estate, but will pass all the interest of the testator in that estate. The exception of the household furniture is of little weight here: as the prior words clearly import real as well as personal estate, it matters little that the exception to the gift happens to be of personal chattels.

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March 21.

SMITH v. ANDERSON.

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty,—there the annuities shall be paid clear of legacy duty.

THE testator by his will gave, first, some legacies, and then certain annuities; and he directed that “all the said annuities should be charged upon and issuing out of all and singular his leasehold estates, and be paid to the respective annuitants without any deduction or abatement out of the same, on any account or pretence whatsoever.” By the residuary clause he directed that the residue of his personal estate, other than his leaseholds, should be converted into money; that, in the first place, his debts and funeral and testamentary expenses should be paid out of the proceeds thereof, and that the surplus should be invested in the funds or upon real security; and that his trustees should stand possessed of the stock or money, and of all his leasehold estates, upon trust, out of the dividends, interest, rents, and income thereof, to pay the ground rents and other payments to which the leasehold estates were or might be subject or liable, including the expense of insuring the premises from fire, and of keeping them in good repair and condition; and also to pay the several annuities thereinbefore given and charged upon the said leasehold estates; and to apply the surplus upon other trusts therein mentioned.

The testator made several codicils to his will, in which he altered the amount and number of the annuities, but always referred to them, with trifling variations of expression, as annuities to be paid without any deduction.

The

The bill was filed by the annuitants claiming their annuities, without any deduction in respect of the legacy duty.

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v.
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Mr. Lovat, for the Plaintiffs, cited *Barksdale v. Gilliat*. (a)

Mr. Lee, *contra*.

In *Hales v. Freeman* (b), a legatee, to whom an annuity was given "clear of all deductions," was compelled to refund the amount of the duty to the trustee; and "clear of all deductions" are expressions equivalent, in effect, to "without any deduction or abatement." Here the direction that the annuities should be paid without deduction or abatement, may be satisfied by a reference to the deduction or abatement to which they might be exposed, in consequence of the rents and other payments to which the leaseholds were liable. It is observable, that the testator in the residuary clause has specified various particular payments which are to be made out of his general residuary personal estate and leaseholds: if he had intended that the fund should be burdened with the legacy duty, in addition to the annuities, is it not likely that the legacy duty would have been mentioned, as well as other less important charges which he has enumerated?

The MASTER of the ROLLS.

In the case of *Hales v. Freeman* there were words, which, although less strong than the words used in the present case, might have raised a similar question. But, upon reading the report, it appears that these words were not noticed by either the bar or the Bench, and that

(a) 1 *Swanst.* 562.

(b) 1 *Brod. & Bing.* 391.

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that the argument and decision in that case proceeded upon a totally distinct ground.

I admit that it is to be stated as the fair result of Lord *Eldon's* judgment in *Barksdale v. Gilliat*, that he considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. It is said that, in this case, there were such other deductions, because the leasehold estates were subject to ground rents and repairs and other expenses; and that it might be the intention of the testator, therefore, to declare, that the annuitants should not bear any proportion of these charges. In the first place, it is to be observed, that the leasehold estates were the secondary, and not the primary fund out of which the annuities were payable; the income of the residuary personal estate, other than the leaseholds, being the primary fund. But what is of much more importance here is, that the testator has directed that all charges, to which the leasehold estates were or might be liable, including the expense of insurance, should in the first place be paid out of the income of his residuary estate, and before the annuities were to be paid. He could not, therefore, have in his contemplation any deductions which might arise in respect of charges on the leasehold estates.

Let it therefore be declared, that the annuitants are to be paid by the trustees and executors, without any deduction in respect of the legacy duty.

1828.

BARFIELD v. KELLY.

Rolls.

March 21.

THE Plaintiff *Barfield*, who was a bookseller, entered, in the year 1811, into a contract with *Peter Nicholson*, one of the Defendants, to publish a work called *The Architectural Dictionary*, of which *Nicholson* was the author, for their joint and equal benefit. The Plaintiff accordingly published the work, and, in the year 1821, he purchased from the Defendant *Nicholson* his moiety of the concern. In the deed of assignment by *Nicholson* there was contained a covenant on his part, that he would not write or publish, or cause or procure to be written or published, any abridgment of that work or of any part thereof, or any other kind of publication which might prove prejudicial or detrimental to the sale of the *Architectural Dictionary*; and that he would not in any manner, directly or indirectly, impede its circulation or publication.

Where the answer of a Defendant insists that a covenant was inserted, without his knowledge or consent, in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved *vice versa* against him as an exhibit; but it may be so proved as against another Defendant, whose answer does not impeach the validity of the covenant.

In July 1823, the first number of a work called *The Practical Builder* was published by the Defendant *Kelly*, as the work of the other Defendant *Peter Nicholson*; and, in the beginning of the year 1824, the present bill was filed, insisting that the *Practical Builder* was a piracy of the *Architectural Dictionary*, and praying that the Defendants might be restrained from the further publication of the *Practical Builder*.

At the hearing of the cause, a bill will be dismissed, if there be no evidence against a Defendant, although, upon a motion for an injunction, a case was

Immediately after the filing of the bill, the Plaintiff moved for and obtained *ex parte* an injunction against

both

made against him, on which an *ex parte* injunction was sustained.

A Plaintiff must establish at the hearing, that he had a title to relief at the time of filing his bill; or, if he relies on matter subsequent, he must file a supplemental bill.

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both the Defendants. The Defendants, having put in their answers, moved before the Vice-Chancellor to dissolve the injunction which had been so obtained. Upon that motion, the Vice-Chancellor, after expressing an opinion that the *Practical Builder* was not a piracy of the *Architectural Dictionary*, continued the injunction against the Defendant *Nicholson* upon the ground of his covenant; and, the Plaintiff declaring himself to be ready to try the question of piracy with the Defendant *Kelly* at law, the Vice-Chancellor dissolved the injunction against the Defendant *Kelly*, he undertaking to keep an account of the profits of the work, until after the trial of the action. (a)

The Plaintiff afterwards appealed from this order to the Lord Chancellor, who concurring in opinion with the Vice-Chancellor as to the question of piracy, the Plaintiff then urged that the Defendant *Kelly*, having by the filing of the bill full notice of the covenant entered into by *Nicholson*, was from that time so far affected by the covenant, that he could not be permitted to aid *Nicholson* in the breach of it, either by using his name as the author of the *Practical Builder*, or by employing him in the composition of the work; and the Lord Chancellor, acting upon that principle, granted an injunction against the Defendant *Kelly* accordingly. (b)

Nicholson in his answer insisted, that the covenant in question had been introduced into the deed without his knowledge or consent; that the deed had not been read over to him; and that the covenant was a fraud upon him. He likewise filed a bill to impeach the deed on that ground.

Kelly

(a) The case, in this stage, is reported in 2 *Sim. & Stu.* 1., under the name of *Barfield v. Nicholson*.

(b) 2 *Sim. & Stu.* 9, 10.

Kelly did not insist in his answer, that the assignment by *Nicholson* was fraudulent.

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The cause now came on for hearing. The Plaintiff had not entered into evidence: but he had obtained an order to prove exhibits *viva voce*; and at the hearing, he produced the deed of assignment containing *Nicholson's* covenant, and proposed to prove it *viva voce* as an exhibit.

For the Defendants, Mr. *Horne* and Mr. *Wakefield* objected, that this deed could not be proved as an exhibit *viva voce*. *Nicholson* had, in his answer, insisted that the covenant had been introduced into the deed without his knowledge or consent; that the deed had not been read over to him; and that the covenant was a fraud upon him. It was therefore material that the Defendant should have the opportunity of cross-examining the witness to the execution of the deed.

Mr. *Rose*, Mr. *Bickersteth*, and Mr. *Roots*, *contra*.

The MASTER of the ROLLS was of opinion, for the reasons urged, that the deed could not be proved *viva voce* as an exhibit against the Defendant *Nicholson*, but that it might be proved *viva voce* against the Defendant *Kelly*, who had not in his answer impeached its validity.

The proof of this deed *viva voce* against the Defendant *Kelly* was the only evidence in the cause.

Mr. *Horne* and Mr. *Wakefield* submitted that the bill must be dismissed. The whole of the Plaintiff's case depended upon *Nicholson's* deed; and, as against *Nicholson*, that deed was not proved. As against *Kelly*, the deed,

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deed, though in evidence, could have no effect, except as raising an equity from the time when he had notice of it by the filing of the bill. At the filing of the bill, therefore, the Plaintiff had no ground of complaint against *Kelly*; and there was no evidence that *Kelly* had subsequently done him any injury, or had infringed any of the rights which he claimed under the deed.

For the Plaintiff it was insisted, that the Court had, upon its own records, and in the injunction which it had granted, and which, after long discussion, had been sustained to some extent, ample evidence that the Plaintiff had not filed his bill improperly. The deed, upon which the injunction proceeded, was before the Court; and the Plaintiff had a right to ask a declaration, that *Kelly* ought not to use the name of *Nicholson*, or to employ him in contravention of the covenant, and the continuance of the injunction which the Lord Chancellor had granted.

The MASTER of the ROLLS, after referring to the former proceedings in the cause upon the several applications with respect to the injunction, continued to the following effect: —

The result of this cause is extremely singular; but the Plaintiff must abide by the consequence of his own default. As against the Defendant *Nicholson*, there is no evidence whatsoever, nor has a word been read from his answer, and as against him, therefore, no case being now made, the bill must be dismissed with costs.

As against the Defendant *Kelly*, the deed containing *Nicholson's* covenant is in evidence; and upon the principle of the Lord Chancellor's injunction against *Kelly*, the Plaintiff would now be entitled to continue that injunction, and *Kelly* would be accountable for all profits which

which he has made by the *Practical Builder* since the filing of the bill, provided there were allegation and proof on the part of the Plaintiff, that, since the filing of the bill, the Defendant *Kelly* had published the *Practical Builder*.

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The original bill could contain no such allegation, because it is matter subsequent; and there is no supplemental bill filed, asserting the fact; the answer of the Defendant *Kelly* expressly denies the fact; and no reference can now be made to the affidavits filed upon the application for the injunction. The general principle is, that the Plaintiff must establish a title to relief at the time of the filing of the bill; for if he then had no title to relief, his bill was improperly filed. As against *Kelly*, he could have no title to relief at the time of filing his bill; for it was only by the Plaintiff's bill that *Kelly* had that notice of *Nicholson's* covenant, which made him responsible to the Plaintiff. This general principle was formerly acted upon so strictly in the Court of Exchequer, that, upon a bill for tithes, the account was confined to the time of filing the bill; and a new suit was necessary in respect of tithes subsequently accrued. But general convenience has since relaxed the rule in matters of account in all courts of equity.

Upon the whole, therefore, there is no case now before me upon which I can continue the injunction, or direct an account against *Kelly*; and the bill, as against him also, must be dismissed with costs.

1828.

ROLLS.

KENDALL v. KENDALL.

March 19. 24.

Whether stock will or will not pass under the word "monies," or under the word "goods," or under the word "chattels," depends upon the whole context of the will.

The word "goods," and equally the word "chattels," used simply and without qualification, will pass the whole personal estate, including stock.

A bequest of "all monies, goods, chattels, clothing, &c., the testator's property, which may remain after paying his funeral charges and debts," will pass the testator's interest in stock and money.

WILLIAM KENDALL by his will, dated the 6th of *April* 1816, devised certain real estates to three trustees, to the use of his son *William* for life, with remainders over for the benefit of *William's* children; remainder to his son *Richard* for life, with remainders over for the benefit of *Richard's* children; and he empowered his sons *William* and *Richard* respectively, when entitled in possession to the rents of the lands, to appoint, by deed or will, as a jointure to any woman with whom they might intermarry, an annuity not exceeding 150*l.* a year to be issuing out of the devised premises.

After various other devises and bequests, he proceeded to bequeath unto his three executors, *William Kendall*, *John Wright*, and *Samuel Pickering*, 1000*l.* Long Annuities, 500*l.* Navy 5*l.* per cent. Bank Annuities, and 950*l.* 4*l.* per cent. Bank Annuities, standing in his name, and such further sum in the 5*l.* per cent. Bank Annuities as might happen to be in his name at the time of his death, upon trust, "to pay to or otherwise permit my said wife, and her assigns, during the minority of my son *Richard Kendall*, to receive and take the interest and dividends and produce of the said last-mentioned trust funds, for her and their use and benefit; and upon further trust, when and so soon as my said son *Richard* shall attain his age of twenty-one years, then, as to the last-mentioned funds, upon trust, that the said trustees or trustee for the time being do and shall either apply the same for the benefit

benefit of my said son *Richard*, upon the like trusts as are hereinafter declared concerning the monies to arise by sale of my *Lincolnshire* estate, or do and shall settle the same upon or for the benefit of the said *Richard Kendall* and his issue, in such manner as they the said trustees or trustee for the time being shall in their or his discretion think fit." In the event of *Richard's* dying under twenty-one, this property was given to the testator's wife during her life, and, after her decease, was to fall into the residue.

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In a subsequent part of the will, the testator devised his *Lincolnshire* estate unto *William Kendall*, *John Wright*, and *Samuel Pickering*, upon trust to sell it: "and I declare," continued the testator, "that the said trustees or trustee for the time being shall invest the monies to arise by such sale in the public stocks, or at interest on real securities, and shall, during the minority of my said son, pay and apply the interest, dividends, and annual produce thereof, to or for his benefit, in such manner as to the said trustees or trustee for the time being shall seem meet, and, when and so soon as my said son *Richard* shall attain the age of twenty-one years, do and shall pay and apply the whole of the said trust funds and securities in such manner for the benefit or the establishing and settling in life of my said son *Richard*, as the said trustees or trustee for the time being shall in their or his discretion think fit." If *Richard* died under twenty-one, these trust funds were given to the other children of the testator who should be then living.

The testator *William* left his two sons, *William* and *Richard*, him surviving. *Richard* attained twenty-one, and married. His will, dated the 12th of *April* 1826, was in the following words:—

"First,

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"First, at my death I give and bequeath to *Susannah Jane Kendall*, my beloved wife, the sum of 150*l.* per annum during her natural life, as I am empowered to do by the will of my late beloved father *William Kendall*, bearing date the 6th day of *April* 1816, to be paid by the executors of the said *William Kendall* deceased. Second, I also bequeath to my said wife all monies, goods, chattels, clothing, &c., my property, which may remain after paying the charges incident to my funeral and such debts as I may owe at my death. Third, it is my wish to make and ordain my dear brother *William Kendall* the sole executor of this my last will."

Richard died shortly afterwards without issue, and leaving his widow and his brother *William* him surviving. The trustees had not exercised the discretion given them, or made a settlement of any part of the trust funds on *Richard* and his issue.

The bill was filed by *William Kendall*, for the purpose of carrying into effect the trusts of the will of the testator *William Kendall*, and of having the rights of parties, claiming under the will of *Richard*, declared.

William, the executor of *Richard*, claimed, as such executor, the stocks in which *Richard* took an interest under his father's will.

The widow of *Richard*, on the other hand, insisted, that the whole of the personal estate of *Richard*, including those stocks, was expressly bequeathed to her; or at least, that, if she did not take the whole, she was entitled to an annuity of 150*l.* a year issuing out of those stocks.

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Mr. Pepys and Mr. Randall, for the Plaintiff.

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Upon the true construction of the will of *William Kendall, Richard*, at the time of his death, was entitled absolutely to the stocks, which had been specifically bequeathed to him, or which had been purchased with the price of the *Lincolnshire* estate, subject only to a discretion in the trustees, which could not take away his interest, though it might modify his manner of enjoying it, and which must have ceased at his death. But his father's will did not give him any power over any part of the personal estate or of the produce of the *Lincolnshire* property. The gift, therefore, of the annuity of 150*l.* a year must be inoperative; it is a supposed exercise of a power which he did not possess; it is a charge not upon his own assets, and to be paid by his executor, but upon his father's estate, and to be paid by his father's executors. The fact is, that *Richard*, recollecting that he had a power under his father's will of appointing, in a given event, a jointure of 150*l.* to his wife, meant to exercise that power; either misapprehending or not recollecting the qualification with which it was given, and, therefore, not being aware, that, in the actual circumstances of the family, he was not in a situation to exercise it.

The bequest, which follows, is not a disposition of all his personal estate, but is a specific gift of certain species of property, in none of which is stock included. "Money" will not pass stock; neither will "clothing;" "goods and chattels," in their proper sense, refer only to moveables, and do not include stock. But even if they were sufficient, when standing alone, to pass stock, they cannot have that effect here. For it is clear that they are not intended to denote personal estate generally;

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rally; since they are both preceded and followed by words descriptive of particular species of personalty, and, therefore, are to be taken in such a limited sense as will not comprehend the articles described by those precedent and subsequent words. "Goods, chattels, and clothes," will not pass stock (a): much less will "goods, chattels, clothing, &c.;" for the "&c." is an additional proof that the testator did not conceive that he had used any words which would include all his personal estate; and it is added in order to pass things *ejusdem generis* with the particular species of things before enumerated. *Ommanney v. Butcher* (b), *Hotham v. Sutton* (c), *Crichton v. Symes*. (d)

Mr. *Horne* and Mr. *Wakefield*, for the widow of *Richard Kendall*.

The words "goods and chattels" are sufficient to pass the testator's interest in the stocks in question and all the rest of his personal estate, unless there be found, in the context of the will, something to shew that such was not the intention of the testator. The addition of words, applicable to particular species of property, indicates only an anxiety on the part of the testator that these particular things should pass, and his ignorance that the more general words would have included them, without such an addition. In this will there is nothing to control the operation of the general words. On the contrary, the circumstance that the bequest to the wife is made subject to the payment of the testator's debts and funeral expenses, is a strong indication of his purpose to give her all his personal estate; for it would be absurd to impute to him an intention to throw on his ready money, his furniture and moveables, his clothing and

(a) 1 *Turn. & Russ.* 272.

(b) 1 *Turn. & Russ.* 260.

(c) 15 *Ves.* 319.

(d) 3 *Atk.* 61.

and other articles of the same kind, the payment of his debts and legacies, (a charge which would, in fact, consume more than the value of that part of his property, and leave nothing for his widow, the object of his bounty,) and to give the great mass of his property, exempt from that charge, or liable to it only after the particular fund, specified to have been given to the wife, had been exhausted, to his executor in the character of executor.

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If the widow does not take the whole of *Richard's* personality, she is at least entitled to an annuity of 150*l.* a year out of the dividends of the stocks, to which, at the time of his death, he was entitled under his father's will. He unquestionably had power to dispose of those stocks; and he, therefore, had power to direct an annuity to be paid out of them. He orders it to be paid by his father's executors, because the funds were in their name.

Mr. *Moore*, for the widow of the testator *William Kendall*, submitted, whether *Richard*, at the time of his death, was entitled absolutely to the sums of stock mentioned in his father's will; and cited *Robinson v. Cleator*. (a)

Mr. *Lynch*, Mr. *Stinton*, and Mr. *Campbell*, for other parties.

The MASTER of the ROLLS.

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The first question made is, Whether *Richard*, under the will of his father, took any interest of which he had power to dispose by will; and the remaining question is,

(a) 15 Ves. 526.

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is, Who are, under the will of *Richard*, now entitled to such interest as *Richard* had power to dispose of?

The testator *William*, by his will, gave to trustees therein named certain sums of stock, upon trust to pay the dividends to his wife, until his son *Richard* should attain twenty-one, and then, as to the said funds, to apply the same for the benefit of his son *Richard*, upon the like trusts as were thereafter declared concerning the monies to arise by the sale of his *Lincolnshire* estate, or otherwise to settle the same upon or for the benefit of *Richard* and his issue in such manner as they in their discretion should think fit. The trustees did not exercise the discretion thus vested in them to make a settlement of these funds for the benefit of *Richard* and his issue; and it becomes necessary, therefore, to refer to the trusts, which were declared in the subsequent part of the will of *William* with respect to the monies which were to arise from the sale of the *Lincolnshire* estate, because, by those trusts, the right to these funds is now to be ascertained.

In the subsequent part of his will, the testator *William* devised to the same trustees his estate in *Lincolnshire*, upon trust to sell the same, and to invest the monies in the public stocks or funds or upon real securities, and to apply the dividends or interest for the benefit of *Richard* during his minority in such manner as they should think fit; and when *Richard* should attain twenty-one, then to apply the whole of the said funds and securities in such manner for the benefit of *Richard*, or for the establishing and settling of him in life, as they should, in their discretion also, think fit; and if *Richard* should die under twenty-one, then the same funds and securities were to be held in trust for all the other children of the testator *William* in equal shares. Consequently, when
Richard

Richard attained twenty-one, the trustees held the funds or securities, in which the price of the *Lincolnshire* estate had been invested, for the sole benefit of *Richard*, and had no authority to apply them for any other purpose. They were, therefore, the absolute property of *Richard*, subject only to the discretion of the trustees as to the time and manner in which they should be paid to him or applied for his use. That discretion necessarily ceased upon the death of *Richard*, when it was no longer capable of being exercised; and, consequently, the price of the *Lincolnshire* estates was property of *Richard*, which would pass by his will; and the several sums of stock, to which I in the first place referred, being limited upon the like trusts as the price of the *Lincolnshire* estate, in case the trustees did not settle the same for the benefit of *Richard* and his issue (and they did not make any such settlement), the necessary consequence is, that those also are property of *Richard*, which would pass by his will.

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The remaining question is, who are entitled to these properties under the will of *Richard*. *Richard* by his will gave to his wife, who survived him, an annuity of 150*l.* a year, which, he therein stated, he was empowered to do by the will of his father. He proceeds in these words:—“I bequeath to my wife all monies, goods, and chattels, clothing, &c. my property, which may remain after paying the charges incident to my funeral and such debts as I may owe at my death;” and he then concludes his will by appointing his brother *William* to be his sole executor. It is said, that the gift of the annuity to his wife operates nothing: that it is a gift made under a misapprehension of his father’s will; that he had, under the will of his father, a power to charge a certain estate with an annuity of 150*l.* in favour of his widow, in case he should become entitled in possession to that estate by the death of his brother *William*

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liam without issue; but that, *William* having survived him, and he having never become entitled to the possession of that estate, he had no authority to charge the property for the benefit of his widow. I think it a very probable conjecture, that, making this will evidently without professional assistance, he did make this gift of the annuity under a misapprehension of the effect of his father's will; and clearly, not being in possession of the settled estate, he could not charge it with this annuity. But courts of justice cannot, with any safety to the rights of property, put a construction upon a will by conjecture, and must govern their decisions by the expressions which a testator has used. His expression is, not that he charges this annuity upon the settled estate, but that he gives this annuity to his wife, as he is empowered to do by the will of his father. If, under the will of his father, he has property which he could charge with this annuity, then the words of the will are satisfied. His father has empowered him to give this annuity; and it is a charge upon all the property which he takes under his father's will.

That is not, however, a very important point, if the wife succeeds in her claim to be absolutely entitled, by the subsequent words, to all the property which *Richard* took under the father's will. If she is absolutely entitled to that property, it is altogether immaterial to the wife, whether, in the prior part of the will, it was or was not charged with an annuity in her favour. It is this circumstance which principally leads me to the conjecture, that *Richard* considered that he had a power to charge the settled estate with this annuity. The brother *William* insists, that the words of the subsequent gift to the wife of "all monies, goods, chattels, clothing, &c. my property," will not pass the sums of stock, which, I have already declared, *Richard* was entitled to under his father's will,

will, and that such sums of stock vest therefore in *William*, in his character of executor, as property undisposed of. It is argued for the executor, that stock will not pass either by the word "money," or by the word "goods," or by the word "chattels;" and that the word "&c.," following clothing, must refer to things *ejusdem generis* with clothing; and cases are referred to as affording these conclusions. It is true, that, upon the whole context of particular wills, it may be clear that stock was not intended to pass, and therefore will not pass, by any one of the words here used: but it is equally true, that, upon the whole context of other wills, stock may pass by any one of the words here used, except the word "clothing." In the case of *Legge v. Asgill* (a), which was before me in the Vice-Chancellor's Court, and to which I may refer as an authority, as my decree was, upon appeal, affirmed by Lord *Eldon*, I held, that an interest, which a testatrix had in a sum of 2500*l.* under the mother's settlement, in case it were not otherwise appointed by the mother, would pass by the words "if there should be any money left." I think this sum of 2500*l.* (part of a sum of 10,000*l.*) was actually invested in stock, though this fact, not being considered material, does not appear in the report. But I am quite sure, that neither upon the principle upon which I decided that case, nor upon the principle upon which Lord *Eldon* affirmed it, would it have made the least difference in the judgment, whether the 2500*l.* was or was not invested in stock.

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The word "goods" and the word "chattels" come under a very different consideration. In the construction of wills of personal estate, the jurisdiction of courts of equity

(a) 1 *Turn. & Russ.* 265, in the note.

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equity being concurrent with that of the ecclesiastical courts, courts of equity follow the rule of the canon law, which is founded upon the civil law. By the canon law, the word "goods," and equally the word "chattels," taken simply and without qualification, comprise the whole personal estate of every description. This is distinctly stated in the 3d vol. of *Swinburn*, 990.: and a reference is made to cases in equity which seem to break in upon this position, shewing that such cases proceeded upon the particular language of the wills upon which they arose. The question, therefore, in the present case is, — not whether the words used are sufficient to comprise stock, — but whether those words are by the context of the will so qualified, that an intention is manifested on the part of the testator to exclude stock.

To refer again to the words "all monies, goods, chattels, clothing, &c. my property," — suppose the words "clothing, &c." were not found in the will, it would not admit of argument, that "all monies, goods, and chattels; my property," would pass the whole personal estate, including stock. Then what effect is the introduction of the words "clothing, &c." to have? The words "&c." are introduced to save further enumeration of particular species of property, and mean strictly "and the rest:" and the will is, therefore, thus to be read, "I give to my wife all my monies, goods, chattels, clothing, and all other things, my property." The words "clothing, &c." must be taken, therefore, to be introduced, not for the purpose of qualifying the general effect of the former terms, "monies, goods, and chattels," but as resulting from the anxiety of the testator to enumerate every species of property which occurred to him, in order that the wife might take every thing which was his property.

It

It may be conjectured that the testator did not know, that, under his father's will, he had a power to dispose of these sums of stock, and that, if he had known it, he would have introduced also the word stock into his enumeration. It is sufficient that there is an apparent intention to give to his wife all his personal estate, and that he has used words which will comprise stock.

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It is worthy of observation, that his gift to his wife is "of all monies, goods, chattels, clothing, &c. my property, which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death." The mention of debts and funeral expenses affords a strong inference, that he considered himself as disposing of that property, which by law was subject to those charges, viz. his residuary personal estate.

I must declare, therefore, that the wife is entitled to all personal estate, including stock, which the testator *Richard* had power to dispose of under his father's will, or was possessed of at the time of his death.

1828.

ROLLS.

March 24.

— v. WALFORD.

If *A.*, for valuable consideration, undertakes to surrender a copyhold to *B.*, and *B.*, on borrowing money from *C.*, enters into a written agreement with *C.*, that he, *B.*, will surrender the same copyhold to *C.* by way of mortgage security, *A.* is not justified in refusing to surrender the copyhold to *B.*, because he, *A.*, has received notice from *C.* of the agreement between him and *B.*

The surrender by *A.* to *B.* does not prejudice, but promotes, that agreement.

THE Plaintiff contracted to purchase from the Defendant *Walford* a certain copyhold estate; but before any surrender was made by *Walford*, the Plaintiff re-sold the estate to *Curtis*, and, upon that occasion, the Defendant *Walford* executed a deed, engaging at the request of the Plaintiff to surrender the copyhold to *Curtis*. *Curtis*, before any surrender made to him, borrowed a sum of money of a person of the name of *Wright*, and signed an agreement with *Wright*, undertaking to surrender this copyhold to *Wright* by way of mortgage for securing the money so borrowed. *Curtis* afterwards, and before the copyhold was surrendered to him, became bankrupt, and the Defendant *Davis* was his assignee. *Wright* served *Walford* with notice of the agreement between him and *Curtis*, and required *Walford* to surrender the copyhold to him, *Wright*. The Plaintiff required *Walford* to surrender the copyhold to *Davis*, the assignee of *Curtis*, in pursuance of the deed which *Walford* had executed; and, *Walford* refusing to make this surrender in consequence of the notice which he had received from *Wright*, the Plaintiff filed the present bill against *Walford* and *Davis*, the assignee of *Curtis*, praying that *Davis* might pay to the Plaintiff part of the purchase-money of the copyhold which remained due to him, and that thereupon *Walford* might surrender the copyhold to *Davis*.

The Defendant *Walford* insisted that *Wright* ought to have been a party defendant to the suit, and that, after
the

the notice he had received from *Wright*, he could not with safety have surrendered the copyhold to *Davis*.

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If *Curtis* had entered into an agreement with *Wright* that *Walford* should surrender the copyhold to *Wright* instead of to *Curtis*, then, upon notice by *Wright* to *Walford* of that agreement, *Walford* could not with safety have surrendered to *Curtis*, and *Wright* would have been a proper party to this suit. But the agreement between *Curtis* and *Wright* being, that *Curtis* should surrender the copyhold to *Wright*, *Walford* was in no manner affected by that agreement, but ought to have made the surrender to *Curtis*, or to the Defendant *Davis*, as the assignee of *Curtis*, at the request of the Plaintiff, according to the effect of the deed which he had executed. The surrender of *Walford* to *Davis* would rather have promoted, than prejudiced, the agreement between *Curtis* and *Wright*; for *Curtis* or his representative could not surrender to *Wright*, until *Walford* had first surrendered to him. *Wright*, therefore, was not a necessary party to this suit, which being occasioned by the conduct of *Walford*, he must pay the costs of it.

1828.

ROLLS.

March 5.

A purchaser not compelled to take a title depending upon the words of a will, which were too doubtful ever to be settled without litigation.

SHARP v. ADCOCK.

THIS was a bill filed by the vendor for the specific performance of a contract for the sale of land. Upon the usual reference, the Master reported in favour of the title; and the cause now came on upon an exception by the purchaser to the Master's report.

The title of the Plaintiff depended upon the will of her late husband, *Thomas Sharp*, which, *inter alia*, was in the words following, viz., "I give and bequeath to my dear wife, *Emilia Sharp*, the whole of my remaining property in the Bank of *England*, or otherwise, and also a freehold house which I now live in, situate in *Silver Street* in the parish of *St. Botolph*, in the town of *Cambridge*, also a freehold estate in *Regent Street*, in the parish of *St. Andrew's*, in the town of *Cambridge*, also about sixty-one acres of freehold land, with houses and barns thereon, situated in the *Fens* and in the parish of *Bottisham*, in the county of *Cambridge*, also about sixteen acres of fen land, freehold, with a house and barn thereon, adjoining the above sixty-one acres in *Bottisham Fen*, also about twelve acres of freehold fen land in the parish of *Sheetham*, in the *Isle of Ely*, in the county of *Cambridge*, also a copyhold estate of the manor of *Ely Barton*, and now occupied by Mr. *Benjamin Pope* of *Sheetham*, and is the estate I lately purchased of Mr. *Orwell Peacock*, also a leasehold estate purchased of the assignees of Mr. *Blacklee*, and which is in the parish of *St. Andrew's the Less*, or otherwise called *Barnewell*, in the town of *Cambridge*, with all right and title to the same: I also leave my wife

wife all monies that should be in my possession at my decease, and all monies due to me on mortgages, notes or note of hand, with all interest due thereon ; also my household furniture, plate, linen, china, and glass, and all other effects : I also leave my dear wife, *Emilia Sharp*, all my share of the property due to me out of the business carried on in the firm of Messrs. *William Sharp, Thomas Sharp, and Frederick Sharp*, but is the sole concern of *Thomas Sharp and Frederick Sharp* only ; the property so belonging to my share consists in estates, freehold and leasehold, mortgages, bonds, notes of hand, bills, drafts, cash, and monies in bankers' hands, outstanding debts, and the stock in trade."

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The land, which was the subject of the contract, was part of the sixty-one acres of freehold land, with houses and barns thereon, situate in the *Fens*, and in the parish of *Bottisham* ; and it was contended that the fee of this land passed to the Plaintiff, the widow, by force of the words " with all right and title to the same," which followed the description of the leasehold estate purchased of the assignees of Mr. *Blacklee*.

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To compel the purchaser to take this title would be to compel him to buy a suit ; for the application of the words, which are relied upon as giving the fee, to all previous devises made to the wife, is much too doubtful ever to be settled without litigation. I must, therefore, allow the purchaser's exception.

The Plaintiff's counsel thereupon pressed for a case at law ; which the Master of the Rolls refused, stating that the opinion given upon the case would not bind the parties interested.

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ROLLS.

COLE v. TURNER.

March 13.

A testator gives an annuity and pecuniary legacies, and then devises all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates to trustees, for the use and benefit of his children. The annuity, and pecuniary legacies, given prior to the devise, are well charged upon the freehold, copyhold, and leasehold estates.

JOHN WHITBREAD made his will in the following words:—"I give and bequeath unto my dear wife, *Louisa Whitbread*, the sum of 200*l.* in lieu of furniture and for mourning. I also give and bequeath unto her one clear annuity of 250*l.*, payable quarterly, for and during her natural life, the first payment to be made on the first quarter-day after my decease: and I direct the same to be paid into her own hands only, and not to be liable to the control, debts, or engagements of any after-taken husband. I give and bequeath unto my trustees and executors 50*l.* a year; to be applied for the maintenance and education of any child or children of my present wife, for each such child, for the maintenance and education thereof; and the sum of 2000*l.* for each such child, on his or her attaining the age of twenty-one years. I give to my executors ten guineas each for their trouble. All the rest, residue, and remainder of my freehold, copyhold, leasehold estates, and all my stock, utensils, farming implements, and the rest of my real or personal property, I give, devise, and bequeath the same, and every part thereof, unto my executors hereinafter named, to hold to them, their heirs, executors, administrators, and assigns for ever, in trust for the use and benefit of my four children, *John*, *Samuel*, *Sarah*, and *Joseph*, equally, share and share alike; and it is my wish that my farming concerns be carried on and conducted under the care of my executors, for the benefit of my said four above-named children; but should any disputes arise among or between them, I direct my executors to sell the whole, and place the proceeds in their names,

names in the Bank of *England* funds, and apply the interest for their maintenance and education, until they attain their respective ages of twenty-one years, and then transfer each of them their respective shares; and, in case of such sale, no purchaser of any part of my estate and effects shall be liable to see to the application of such purchase-money. - - - And I direct one half my daughter *Sarah's* share, in case of her marriage, be settled for her sole use and benefit, independent of any husband she may marry, her receipt alone to be a sufficient discharge for the interest or proceeds thereof during her life; and after her decease, such half part to be equally divided among her children, if more than one, and if but one, to such only child for his or her own use and benefit: the above-mentioned half my daughter's share to be secured upon my copyhold estate at *Marsh-side, Edmonton.*" He appointed his sons *John Whitbread* and *Samuel Whitbread*, and two other persons, executors and trustees of his will.

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The testator left his wife *Louisa*, and the four children named in the will (who were the issue of a former marriage), him surviving. The widow was *enceinte* at his death, and, a few weeks afterwards, had a daughter.

The question in the cause was, Whether the annuities of the wife and this infant, and the pecuniary legacies given prior to the devise to the trustees, were or were not a charge upon the freehold, copyhold, and leasehold estates comprised in that devise?

The freehold and leasehold estates of the testator were not of much value. The copyholds had been sold for 12,000*l.*; and that sum was, in fact, the only fund out of which the annuity to the widow, and the legacy and annuity to her daughter, could be satisfied.

Mr.

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Mr. *Horne* and Mr. *J. Russell*, for the Plaintiffs.

The legacies preceding the devise of the residue of the testator's freehold, copyhold, and leasehold estates, must be a charge upon those estates; for the words necessarily imply that something was to be taken out of the freehold, leasehold, and copyhold estates; and there was nothing that could be taken from the mass, except these legacies. *Bench v. Biles* (a), *Aubrey v. Middleton*. (b) The present case is stronger in favour of the legatees, than either of these: for, in *Bench v. Biles*, the devise of the residue was preceded by a gift of the real estate to the testator's wife for life; and, in *Aubrey v. Middleton*, there was a specific devise of some lands; and, therefore, in both cases, a partial interest in the real estate was given, to which, exclusively of the legacies, the terms "rest, residue, and remainder" might have been supposed to refer.

Mr. *Pepys*, Mr. *Knight*, and Mr. *Beames*, *contra*.

To construe these words as creating a charge in favour, not of creditors, but of mere volunteers, would be to go beyond any decided case. In *Aubrey v. Middleton*, the testator began by expressing an intention to dispose of "all his worldly estate;" and he then gave the residue of his "goods and chattels and estate," blending the whole of the realty and personalty into one fund. In *Bench v. Biles*, the whole of the property, real as well as personal, was thrown into one mass, and treated, both before and after the gift of the legacies, as one fund.

The subsequent part of the will contains directions not very reconcilable with the notion that the testator intended

(a) 4 *Mad.* 187.

(b) 4 *Vin.* 460. *Charge*, D. pl. 15.

intended these legacies to be a charge on his copyhold estate. He farmed the copyholds himself; and he directs his trustees to carry on the farming business for the benefit of his four residuary devisees. In a certain event the property is to be sold, and the interest of the purchase-money is to be applied to the maintenance, not of the pecuniary legatees, but of those four devisees. The provision for *Sarah* is made a specific charge on the copyhold; and that specific charge must be defeated, if the pecuniary legacies are thrown upon the real estate.

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Parker v. Fearnley (a), and *Kightley v. Kightley (b)*, were cited.

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The freehold, copyhold, and leasehold estates are not devised to the trustees, but the rest and residue of these estates—that is, what remains of these estates, after some prior purpose is thereout satisfied. But what prior purpose could the testator here contemplate, except the satisfaction of the annuity and the legacies previously given? (c)

Declare that the annuity and the pecuniary legacies, which are given by the will, prior to the devise to the trustees, are well charged upon the freehold, copyhold, and leasehold estates comprised in that devise.

(a) 2 Sim. & Stu. 592.

(c) *Brudenell v. Boughton*, 2 Atk. 268.

(b) 3 Ves. jun. 328.

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March 25.

HARDWICK v. THURSTON.

A testatrix gives a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment, to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband." This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband.

THE testatrix, *Martha Thurston*, gave to trustees, named in her will, three several sums of money, to be invested in the public funds or upon real securities, upon trust, as to one third part thereof, for such person, or for such uses, trusts, and purposes, as her daughter *Mary Salmon*, the wife of *Edward Salmon*, should, notwithstanding her then present or future coverture, by deed or will appoint; and in default of appointment, upon trust to pay the dividends or interest into the proper hands of *Mary Salmon* during her life, for her sole and separate use, and not to be subject to the debts or control of her then present or any future husband; and from and after her decease, upon trust to assign the said trust monies to such person or persons as would have been entitled thereto, as her next of kin, at the time of her decease, under the statute for the distribution of intestate's personal estates, if she had died sole and intestate, to the utter exclusion of the said *E. Salmon* as her administrator, or by right of marriage or otherwise." Another third part of the said several sums of money she gave upon similar trusts, and subject to similar provisos, for the separate use of her daughter *Mrs. Gwynn*, and her appointees, "or such other person or persons in default of appointment, or as near thereto as the deaths of the parties, and other intervening circumstances would admit and allow." The remaining third part the testatrix gave "for similar trusts, ends, intents, and purposes, and with, under, and subject to similar powers, provisos, declarations, and directions in every respect, for the separate use and benefit of my daughter *Ursula Thurston*, independent of any husband, and such her appointee

appointee and appointees, or other person or persons entitled in default of appointment, as are hereinbefore respectively declared and contained of and concerning the said several hereinbefore-mentioned trust sums, for the separate use and benefit of my said daughters *Mary Ann Salmon* and *Margaret Gwynn* respectively, and the benefit of such appointee and appointees, or such other person or persons in default of any appointment, or as near thereto as the deaths of parties or other intervening circumstances will admit and allow."

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Ursula Thurston, the last-mentioned daughter, was unmarried at the time the testatrix made her will; but she afterwards married, and died during the lifetime of her mother, leaving the infant Defendant, *Ursula Margaret Thurston Grove*, her only child.

The question in the cause was, Whether such child was, or not, entitled to the one third of the three several sums, which had been so given to her mother; or, whether that legacy became altogether lapsed, by the death of *Ursula Thurston* in the lifetime of the testatrix; or, whether it went to such persons as would have been next of kin of *Ursula Thurston* at the death of the testatrix, if *Ursula* had died intestate and without having been married.

Mr. *Horne* and Mr. *Wilbraham*, for the infant *Ursula Margaret Thurston Grove*.

Mr. *Pepys*, *contra*.

The gift is to such person and for such uses as the testatrix's daughter should by deed or will appoint, and in default of appointment, to the daughter for life, to her separate use, and after her decease, to those who, if she had

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had died unmarried, would have been her next of kin. This is in substance a gift to the daughter, only guarded so as to protect the legacy from the marital power of her husband. With the exception of the exclusion of the husband, the property is to go in precisely the same way as if it had been given to the daughter absolutely. Her next of kin were intended to take only in default of her exercising the power of appointment which was given to her; and by the death of the legatee in the lifetime of the testatrix, the whole of the gift must fail. *Tidwell v. Ariel.* (a)

Even if the words, "to such person or persons as would have been her next of kin, if she had died sole and intestate," should be held to give an interest by way of remainder, distinct from the interest given to the daughter, yet the child cannot come within that description. The property, in effect, is directed to go in the same way as it would have gone if the daughter had not married: and, as in that case there could not have been a child of the daughter, the persons who are to take must be those who would have been the daughter's next of kin, supposing she had died before her marriage.

The MASTER of the ROLLS.

In the case of *Tidwell v. Ariell*, the legacy was, in the first place, given absolutely to the legatee, who died before the testator; and the limitation over, there contended for, was held to apply only to the death of the legatee, in case she survived the testator, and died within the year after the testator's death. That case has no application here. In the present case the daughters
 have

(a) 3 *Mad.* 403.

have no absolute gift of their respective thirds of the trust-monies, but are merely tenants for life, with a power of appointment, with remainder, in default of appointment, to their next of kin. This is, therefore, the common case of the death of a tenant for life before the testatrix; and the remainder over takes effect upon the death of the testatrix.

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It is true, that there are introduced the words, “ as if she had died sole and intestate, to the utter exclusion of the husband:” but it must be considered, that this expression was used for the sole purpose of excluding the husband, and was not intended to exclude a child in favour of other persons more remote and uncertain.

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March 25.

MOUNSEY v. BLAMIRE.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir at law will take the legacy, and not the next of kin.

In such a case, it makes no difference, that there are three co-heirs.

THE testatrix, by her will in this case, *inter alia*, devised a real estate to a person whom she described as her kinsman, and who was not her heir at law, and directed him to assume her name and arms. By a codicil to her will, she gave several pecuniary legacies, and amongst others, "to my heir 4000*l*."

At the death of the testatrix, three persons were her co-heirs at law: and the question in the cause was, Who was to take this legacy? — whether the three co-heirs, or the next of kin, or the devisee of the real estates, who, it was argued, was *hæres factus*.

Mr. *Bickersteth*, for a person claiming to be heir *ex parte maternâ*, insisted that the testatrix plainly intended this sum as a legacy to a single individual; that, as she had three co-heirs at law, it would be uncertain whom she meant, if the word "heir" was to be understood as her heir at law, and that evidence was admissible to explain this latent ambiguity.

The MASTER of the ROLLS refused to admit the evidence; stating that the word *heir* was *nomen collectivum*, and would legally include all those who filled that character.

Mr. *Pepys*, for the heirs at law.

Here is a gift of personal property to the person or persons answering the description of heir at law; and it would be an extraordinary construction, if the Court
were

were to hold, that those are to take, who are not the heirs at law. There is no doubt that an heir at law may, as a purchaser, and under that designation, take personal property, *Gwynne v. Muddock* (a): and there is no expression in this will, which can induce the Court to depart from the obvious meaning of the words.

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Mr. *Purvis*, for some of the next of kin.

In *Holloway v. Holloway* (b), a sum of money was given, in the events that happened, to a daughter of the testator for life, and after her decease, to such person or persons as should be the testator's heir or heirs at law. The same persons, who were next of kin, happened also to be the heirs at law; so that it was not necessary to decide the point: but Lord *Alvanley* observes, "It is said, that though 'heirs,' &c. have a definite sense as to real estate, yet, as to personal estate, it must mean such persons as the law points out to succeed to the personal property. I am much inclined to think so. If personal property was given to a man and his heirs, it would go to his executors. I rather think, if I was under the necessity of deciding this point, I must hold it heirs *quoad* the property: that is, next of kin." In *Vaux v. Henderson* (c), a legacy was given to A., and, failing him by decease before the testator, to A.'s heirs. A. having died in the testator's life, Sir *William Grant* held, that the legacy belonged to the next of kin of A. living at the testator's death.* The rule

(a) 14 *Ves.* 488. (b) 5 *Ves.* 399. (c) 1 *Jac. & Walk.* 388. n.

* Under a devise of gavelkind English to his heir, the eldest son, and not the youngest, takes. the heir at law of J. S. takes, *Vin. Abr.* vol. xiv. p. 258, 259. and not his gavelkind heirs. So, *Heir*, (G) 5. pl. 1. 8. if a man devise lands in borough

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rule of the Court, therefore, is, that the term *heir* is in general to be construed with reference to the species of property which is the subject of disposition, and that, when used with reference to personal property, it means "next of kin."

Mr. *Witham*, for others of the next of kin.

Mr. *Barber*, for the devisee, contended, that by her heir the testatrix must have meant the person whom she had put in the situation of heir as to her real estate, and who, in truth, was *hæres factus*.

Mr. *Phillimore*, for the trustees.

Mr. *Pepys*, in reply.

In *Holloway v. Holloway*, the intention of the testator was, that, in the events which happened, the sum in question should revert to and be a part of his general estate. In *Vaux v. Henderson* the object was, if *A.* died before the testator, to substitute for *A.* those who might be his heirs; that is to say, those who were his heirs to that particular species of property. Both these cases, therefore, are distinguishable from the present. If this legacy be given to the next of kin, a partial intestacy will be created; and the bequest will, in fact, be a bequest to persons who would have taken the property without any gift.

March 26. *The MASTER of the ROLLS.*

There is no ground here for the claim of the devisee, or *hæres factus*, as he is called at the bar. The question is between the co-heirs and the next of kin. In the construction of a will, every word is to be understood
 in

in its legal and ordinary sense, unless it be controlled by the context: and there is no expression in this will or codicil to control the natural and ordinary sense of the word "heir." It is said, that, the subject of the gift being money, the natural and ordinary sense of the word is thereby controlled, and it is necessarily to be inferred, that by the word *heir* the testatrix meant such persons as by law would inherit, not her real estate, but her money. This appears to me to be by no means a necessary inference. Why may it not be reasonably intended, that a testatrix, who gives to another that real estate which the heir would inherit, if she had not otherwise disposed of it, means to make him some compensation by a pecuniary legacy?

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No authority has been cited which is expressly in point. Where the word "heir" is used to denote succession, there it may well be understood to mean such person or persons as would legally succeed to the property according to its nature and quality; as in *Vaux v. Henderson*, which has been principally relied upon in the argument; and in the familiar case of a gift of personal property to a man and his heirs. But where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, there it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word "heir." The co-heirs, therefore, must take the 4000*l.* as joint-tenants.

1828.

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ROLLS.

JERNINGHAM v. HERBERT.

March 26, 27.

A testatrix gave such of her jewels, as should, at her death, be deposited in her jewel-box at *Rundell and Bridge's*, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to *A. B.*; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at *Rundell and Bridge's*, nor was there any written paper designating who were to take the jewels:—the intended gift of the jewels wholly fails.

A *Scotch* heritable bond, although it

contain a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an *English* will, but descends to the heir at law.

THIS was a bill filed for the purpose of carrying into effect the trusts of the will of Mrs. *Anne Frances Middleton*, and now came on to be heard upon exceptions to the Master's report and for further directions.

The exceptions raised several questions upon the construction of the will, which were heard and disposed of separately, and, amongst others, the following question:—

The will of the testatrix contained the following bequest:—"I give so much and such parts of my jewels, watches, trinkets, and other articles of dress and personal ornaments, which shall happen at my decease to be contained in my two jewel-boxes deposited by me at Messrs. *Rundell and Bridge's*, *Ludgate Hill*, to such persons as the same shall be found to be distributed in a paper written by me within such jewel-box; and as to all the rest of my jewels, watches, trinkets, and other articles of dress and personal ornaments, I give and bequeath the same to my daughter *Louisa Anne Middleton*, for her own absolute use and benefit for ever."

The testatrix, at the time of making her will, had no jewel-box at Messrs. *Rundell and Bridge's*; but she had a jewel-box then deposited with a banker. Shortly afterwards, and about two years before her death, a commission of lunacy issued against her; and her com-

mittee,

mittee, in *March* 1818, deposited all her jewels, &c., at Messrs. *Rundell and Bridge's*; but, prior to her death, they were removed, under an order made in the lunacy, to the Bank of *England*, where they remained at her death; and no paper was found containing directions as to the disposition of any part of them.

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The Master reported, that the jewels, trinkets, and other articles of personal ornament of the testatrix, which were deposited in the Bank of *England* at the time of her decease, were by her will specifically given to her daughter, *Louisa Anne*, who was now the widow of Mr. *Herbert*.

The Plaintiffs, by their exception, insisted, that these jewels, trinkets, and other articles of dress and personal ornament were not specifically bequeathed, but formed part of the testatrix's residuary personal estate.

Mr. *Rose* and Mr. *Lynch*, for the exception.

There was no intention to give more than a part of the jewels to *Louisa*; and unless that part can be ascertained, the bequest must fail. In order to ascertain what *Louisa* was to take, we must know what was contained in the two jewel-boxes deposited with Messrs. *Rundell and Bridge*; and as there was not, either at the death of the testatrix, or at the date of her will, any box in circumstances corresponding to those mentioned in the bequest, nor any paper writing such as the bequest refers to, it is impossible to ascertain what that "rest" was, which *Louisa* was to take. *Peck v. Halsey.* (a)

The clause in the will is not a complete disposition of the jewels; it does no more than express an intention, which

(a) 2 P. Wms. 387.

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which was to be perfected by subsequent acts: those acts the testatrix has not done, either from having changed her purpose, or in consequence of the mental infirmity to which she became subject.

Mr. Pepys and Mr. G. Richards, contra.

The words amount to an immediate gift to *Louisa*; for they are, "I give all the rest of my jewels, &c.;" and *Louisa* will take all the jewels, which are not well given to some other person. It is clear, that, at the testatrix's death, there were not any jewels in such circumstances, that the preceding words can be held to apply to them. Nothing, therefore, is excepted from the gift to *Louisa*. It is a perversion of legal principle to say, that a general gift shall fail, because a possible exception from it happens to fail. If a testator, after some partial bequests, disposes of the residue of his property, the effect of the failure of the partial bequests, is, not to destroy the residuary disposition, but to increase the amount of the property comprised in it. There would have been little weight in the argument for the Plaintiffs, even if the testatrix had referred to jewels in boxes actually deposited at the date of her will, and then disposed of by some paper writing. But the words, which make the supposed exception from the gift to *Louisa*, are merely prospective, and refer to a future act which the testatrix might or might not continue to intend.

The MASTER of the ROLLS observed, that the will contained no present gift of the jewels and other specified articles, but referred to a future act to be done by the testatrix in order to complete her gift; and that, this future act being prevented by the subsequent lunacy, the intended gift of the jewels wholly failed.

Exception allowed.

In

In another part of the will, the testatrix gave, in manner therein mentioned, "a sum of 5000*l.* lent by her on the estate of *G. Johnstone*, Esq. on mortgage." By the decree made at the hearing of the cause, it was referred to the Master to inquire, and state to the Court, on what estate and in what manner the sum of 5000*l.*, in the testatrix's will mentioned to be lent on the estate of *George Johnstone*, Esq. on mortgage, was secured, and in whom such sum of 5000*l.* was then vested, and for whose use and benefit.

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In answer to that inquiry, the Master stated, that *George Grant*, in 1802, sold to *George Johnstone* an estate in *Scotland*, which was in settlement; that, *Mary Grant*, the wife of *George Grant*, being entitled thereout to an annuity of 500*l.* for her life, in case she survived her husband, or he should become bankrupt, it was agreed, that *George Johnstone* should retain 10,000*l.*, part of the purchase-money, as a capital to answer the eventual annuity; which sum, with the interest to grow due thereon, was, by the deed of disposition of the lands to *George Johnstone*, declared to be a real burthen or charge thereupon; and that *George Johnstone*, by his bond bearing date the 2d of *March* 1802, and registered in the books of the court of session, became bound to pay the interest of the sum of 10,000*l.* to *George Grant* during the joint lives of him and his wife, or until she should become entitled to the annuity, and to pay the principal sum itself to *George Grant*, his heirs and successors, upon the decease of *Mary Grant*; which obligation, as far as respected the principal sum, the Master found was subsequently renounced and discharged by *George Grant*. The Master further found, that *George Grant* and *Mary* his wife, by a conveyance in the *Scotch* form, dated the 5th of *October* 1807, duly ratified by *Mary Grant*,

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Grant, conveyed to certain persons therein mentioned, as trustees for their son *Robert Foster Grant*, the interest of the said sum of 10,000*l.* during the joint lives of *George* and *Mary Grant*, and *Mary Grant's* eventual annuity of 500*l.*; and that *George Johnstone*, by his heritable bond bearing date the 26th of *September* 1807, became bound to pay to the trustees the sum of 10,000*l.* principal, within three months after the death of *Mary Grant*, with interest from the day of her death, and, in real security for the payment of these sums, made over the purchased estate to the trustees, who were duly enfeoffed therein according to the forms of the *Scotch* law. And the Master also found, that the trustees, by their deed of disposition and assignment in the forms of the *Scotch* law, at the request of *Robert Foster Grant*, assigned and conveyed to him the eventual annuity of 500*l.*, and the interest of the 10,000*l.* during the joint lives of *George* and *Mary Grant*, and the principal sum of 10,000*l.* payable as aforesaid, and the interest thereof, and the said lands and heritages for the security of these sums, and all right and title which *George Grant* had to the same, and the several securities before recited.

The Master further stated, that *Robert Foster Grant*, by his deed of disposition and assignment in the *Scotch* form, bearing date the 23d of *December* 1809, executed in *London*, did, in consideration of a sum of 10,000*l.* advanced to him by the testatrix, grant, alien, and dispose of, to and in favour of the testatrix and her heirs and assigns, the eventual annuity of 500*l.* upliftable from the purchased estate, and the interest of the sum of 10,000*l.*, payable by *George Johnstone* under the obligation aforesaid, during the joint lives of *George Grant* and *Mary Grant*, together with the security for the payment thereof, created by the disposition of the aforesaid lands and estates, and the bond of *George Johnstone*, together

together with all right, title, and interest which he had to the lands and heritages, — and that, in real security to the testatrix for the payment of the sum of 10,000*l.* and interest; that the testatrix was duly enfeoffed in the purchased estate; that *George Johnstone*, by his bond or obligation in the *English* form and executed in *London*, bearing date the 31st of *March* 1810, became bound to pay to the testatrix the interest of the sum of 10,000*l.* during the joint lives of *George Grant* and *Mary Grant*; and that a sum of 5000*l.*, part of the 10,000*l.*, was paid to the testatrix in her lifetime, and before the making of her will, by the executrix of *George Johnstone*, who was then dead.

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Upon these facts the Master found, that the 5000*l.*, remaining due to the testatrix, was, by the law of *Scotland*, real estate, and did not pass by her will, but descended to her heir at law.

An exception being taken upon this point to the Master's report, the question was, Whether the sum due on *George Johnstone's* bond would pass by an *English* will.

Mary Grant died a few weeks after the testatrix.

Mr. *Treslove* contended, that the interest, which the testatrix had under these securities, was an interest in lands in *Scotland*; that an interest in real estate can be transferred only according to the law of the country where the lands are situate; and that, lands in *Scotland* not being capable of passing by devise, the will of Mrs. *Middleton* could have no operation on the securities for the 10,000*l.*, or on what remained due for principal and interest in respect of them.

Mr.

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Mr. *Pepys* and Mr. *Lynch*, for the parties claiming under the will, argued, that, though the interest in the land was not devisable, the debt and all the personal remedies for enforcing payment of it would pass by the will. That, which the testatrix had devised and bequeathed, was, not land, but 5000*l.* lent on mortgage. The interest of this mortgage debt was secured by an *English* bond, which would unquestionably pass by the will; and if the interest of the debt passed, the principal must also pass.

The MASTER of the ROLLS referred it back to the Master to inquire, whether, by the law of *Scotland*, the testatrix had any right of personal action against *George Johnstone* or his executors, for the principal sum of 10,000*l.*, either in respect of the bond of *George Johnstone* to *George Grant*, bearing date the 2d of *March* 1802, or in respect of the bond of *George Johnstone* to the trustees, bearing date the 26th of *September* 1807; and the Master was to be at liberty to state any circumstances specially at the request of either party.

The Master stated a case, which was submitted to the Solicitor-General of *Scotland* and Sir *James Moncrieff*. They gave an opinion*, that, upon an heritable bond, the

* That opinion was as follows:—“There can be no doubt that the party in the right of an heritable bond has a right of personal action against the debtor or grantor of the bond, and his executors and representatives, for payment of the sum for which the heritable security is granted. The real or heritable security is added, for the safety of the creditor, to the per-

sonal obligation of the debtor; and when a debt is so secured, important consequences follow, in regard to the succession of the creditor's interest in the bond. But the circumstance, that the creditor has obtained real security for the payment of his debt, in no degree alters the right to demand payment in a personal action against the debtor or his representatives.”

the creditor has a right of personal action against the debtor, and that the real charge is added for the security of the creditor: and, upon that authority, the Master found that the testatrix had a right of personal action in respect of *Johnstone's* bonds.

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Upon this report the cause came again to a hearing.

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July 11.

Mr. *Treslove* and Mr. *Bird*, for the heir at law.

Mr. *Pepys*, Mr. *Rose*, Mr. *Lynch*, and Mr. *G. Richards*, for parties claiming under the will.

The authorities cited were *The Duchess of Buccleugh v. Hoare* (a); *Johnstone v. Baker* cited in a note to that case (b); and *Glover v. Strothoff*. (c)

The MASTER of the ROLLS.

July 16.

The late Mr. *George Johnstone* purchased of Mr. *George Grant* an estate in *Scotland*, which Mr. *Grant* had previously charged with an annuity of 500*l.* to his wife, in case she should survive him, or he should become bankrupt; and, upon that occasion, Mr. *Johnstone* was allowed to retain a sum of 10,000*l.* part of the purchase-money, until Mrs. *Grant's* death, paying interest on it, until the annuity should arise. Accordingly *George Johnstone* executed an heritable bond, which, over and above making the sum of 10,000*l.* and the interest to accrue thereon a real burden upon the land, contained a personal obligation on him to pay to *George Grant*, his heirs, executors, and assigns the sum of 10,000*l.* upon the death of Mrs. *Grant*, and also to pay the interest of the said sum

(a) 4 *Mad.* 467.

(b) 4 *Mad.* 474.

(c) 2 *Bro.* 53.

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sum of 10,000*l.* to *George Grant* during the joint lives of himself and his wife, and, in the event of *George Grant* dying before his wife, to pay to her during her life the annuity of 500*l.* *George Grant* and his wife afterwards assigned the sum of 10,000*l.*, and the interest to become due thereon, and the contingent annuity of 500*l.* to certain persons in trust for *Robert Foster Grant*; and, by the deed of assignment, *George Grant* exonerated and discharged *George Johnstone* from the obligation come under by the bond above recited, and from the real burden created on the lands by the disposition granted by him to *Johnstone*, and from the bond itself; and *George Grant* and his wife thereupon delivered up to the trustees an heritable bond by which he had originally charged the lands with the annuity in favour of his wife, together with her instrument of seisin, and the bond or obligation executed by *Johnstone*. At the same time, *George Johnstone*, by an heritable bond and disposition, bound himself to pay to the trustees the sum of 10,000*l.* within three months after the decease of *Mrs. Grant*, with interest from the day of her death until the payment of the principal sum: and, by the same instrument, he made the sum of 10,000*l.* and interest a real burden upon the lands.

The trustees afterwards duly assigned all these securities to their *cestui que trust*, *Robert Foster Grant*. He afterwards assigned them to *Mrs. Ann Frances Middleton*, the testatrix in the cause; and, upon that occasion, *George Johnstone* executed, in *London*, an *English* bond to *Mrs. Middleton*, for the payment to her of the interest of the 10,000*l.* during the joint lives of *George Grant* and his wife, or until the right of *Mrs. Grant* to the annuity should take place. *Mrs. Middleton* by her will gave this sum of 10,000*l.*, with all interest due thereon, upon certain trusts therein mentioned. *Mrs. Middleton*

Middleton died on the 3d of *November* 1823; and *Mrs. Grant*, on the 15th of *December* 1823. A part of the 10,000*l.* was paid to *Mrs. Middleton* in her lifetime: and the question in the present stage of the cause is, Whether the sum, due on the bond for principal and interest, would pass by an *English* will, or was to be considered as an heritable security, which would not pass by will, but would descend to the heir at law?

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v.
HERBERT.

The opinion of the *Scotch* advocates upon the case stated by the Master does not precisely reach the point which arises here. *Mrs. Middleton* was the assignee of *Mr. Johnstone's* securities to the trustees of *Robert Foster Grant*; and the heritable bond, which he executed, contained also a personal obligation to pay the principal sum of 10,000*l.* within three months after the death of *Mrs. Grant*, and to pay the interest on the 10,000*l.* from the death of *Mrs. Grant*; but it contained no obligation to pay the interest of the 10,000*l.* during the joint lives of *Mr. and Mrs. Grant*, and it was for this reason that *Mr. Johnstone* afterwards gave his bond to *Mrs. Middleton* for the payment of such interest. In the case of *The Duchess of Buccleugh v. Hoare* (a), there was an *English* security, as well as an heritable bond; and I there held that the *English* security, passing by the will, would carry with it the debt, although there was also a *Scotch* security. In the present case there is no *English* security, except *Mr. Johnstone's* bond for securing the interest of the 10,000*l.* during the joint lives of *Mr. and Mrs. Grant*; and the *English* will, in respect of the *English* security, will pass this interest.

I believe that it is the practice in *Scotland* always to insert a personal obligation in an heritable bond, but such personal obligation does not alter the heritable
nature

(a) 4 *Mad.* 467.

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nature of the bond ; the maxim of the *Scotch* law being, that the heritable security, which is the *jus nobilius*, draws after it the moveable or personal security. Although, therefore, I am of opinion that the heritable bond of Mr. *Johnstone* gave to Mrs. *Middleton* a right of personal action, the bond nevertheless retained its heritable nature, and did not pass by the *English* will, but descended to the heir at law.

ROLLS.
 1828.
 March 28.

CROZIER v. FISHER.

The word, "survivors," in a bequest to children, held, upon the context of the will, to mean, surviving so as to attain their respective ages of twenty-one.

THE testator, *Joseph Fisher*, by his will dated in January 1822, devised freeholds, copyholds, and leaseholds, together with an annuity which he had purchased of Viscount *Mathew*, in trust, for the separate use of his wife *Elizabeth Fisher*, during her life, and after her death, for the separate use of his daughter *Sarah Elizabeth Boot*, during her life; and, at her death, he gave the rents of four of the tenements to her husband *Thomas Boot* during his life; "and" continued the testator, "at the death of Mr. *Thomas Boot*, I give, devise, and bequeath unto my said son *Joseph Fisher*, his heirs, executors, and administrators, all the above freehold and copyhold estates that I had given to Mr. *Thomas Boot*, during the term of his natural life, to all the children of my said daughter *Sarah Elizabeth Boot* that she now has or may hereafter have by her present or any after taken husband, or the survivors of them, share and share alike, as joint tenants to them and their heirs for ever. And also I give to my said trustee all that annuity I purchased of Lord Viscount *Mathew*; also all that leasehold messuage or tenement, situate in *Nottingham Street*, in the parish of *St. Mary-le-Bone*; and also all that

that leasehold messuage or dwelling house, situate in *Bedford Street, Covent Garden*, let on lease to Mr. *George Carter*, to have and to hold all the said several freehold and copyhold estates, with all their rights, members, and appurtenances thereunto belonging, or in anywise appertaining, to them and their heirs for ever, and all the said leasehold estates for such terms as may be unexpired, with all the said annuity, in whatever state the same may be at the time of my said daughter's death, to my said trustee upon this special trust and confidence, to receive the rents and profits of all the said several estates for the sole use and benefit of all the said children of my said daughter; and my further will is, that my said trustee shall, from time to time, as the rents become due, pay unto such child or children a just proportion of such interest, as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the three per cent. Consolidated Bank Annuities for their own sole use and benefit, and so on alternately, till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children, or the survivors of them, to be let into full possession of all the said estates, share and share alike. I give unto my grand-daughter *Elizabeth Boot*, as her share of all the said children's estate, all those two annuities that I purchased of Mr. *Edward Smith*, secured on premises in *Brompton Row, Knightsbridge*, as a marriage portion: now, I give unto my son *Joseph Fisher* the two said annuities in trust for my said grand-daughter upon this special trust and confidence, to pay unto her all the interest of the said annuities, as they shall become due and paid, for her own sole and separate use."

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v.
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The testator died in 1803. At that time, *Thomas Boot* and *Sarah Elizabeth Boot* had ten children, several of whom died under twenty-one.

The



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The leaseholds in *Bedford Street* and *Nottingham Street*, as well as the annuity, were part of the property which was given to *Mrs. Boot* for her life: and, on her death, the question arose, at what time the interests of her several children in this portion of the assets became vested.

Mr. Pepys and *Mr. Girdlestone*, for the Plaintiffs.

Mr. Treslove, *Mr. Wakefield*, *Mr. Tinney*, and *Mr. Lovat*, for different Defendants.

One construction contended for was, that the shares of the property did not vest, till the youngest child attained twenty-one; or if the share of an elder child did vest at any earlier period, yet that it would be divested, in the event of his dying before the youngest reached his full age. It was when the youngest child attained twenty-one, and not till then, that the property was to be distributed among the children; to that time, therefore, the term "survivors" was to be referred; and only such of the children, as should be then living, could take.

Another construction was, that the shares vested in the children as they respectively attained twenty-one, and that the phrase, "the said children or the survivors of them" was equivalent to "all the said children, or such of them as shall live to attain the age of twenty-one." Each child, as he attained twenty-one, was to receive his share of the accumulated rents and profits: a direction which was irreconcilable with the supposition, that the interest was liable to be divested by any subsequent event.

A third construction was, that the word "survivors" was to be referred to the death of the tenant for life, and
that

that all the children, who survived the tenant for life, took vested interests, even though they did not attain twenty-one years. The trustees, it was said, were directed from the death of the daughter to receive the rents and profits for the sole use of all her children, and the shares of the infants were ordered to be invested for their benefit. All the children, therefore, who were then living, took a vested interest in the rents and profits; and it could scarcely be supposed that the testator meant the shares of the rents and profits to vest at one time, and the shares of the capital to vest at another.

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The MASTER of the ROLLS stated, that the Court would not, unless forced by the plainest words, adopt a construction, by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one; that here the word "survivor" admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children, who died before attaining twenty-one, took, during their lives, a vested interest in that proportion of the rents and profits which corresponded to their presumptive shares, but that such interest determined on their deaths.

The decree was as follows:—His Honor doth declare, that all the children of *Sarah Elizabeth Boot*, who lived to attain the age of twenty-one years, except the Defendant *Elizabeth Machon**, took vested interests in the

* *Elizabeth Machon* was the grand-daughter *Elizabeth*, to whom two annuities were bequeathed in lieu of her share of the fund.

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the leasehold estates in *Bedford Street, Covent Garden*, and *Nottingham Street*, in the parish of *Mary-le-bone*, and in the produce of the annuity purchased by the testator of Lord Viscount *Mathew*, in the will of the testator respectively mentioned; and that the shares of such of the children of *Elizabeth Boot*, who died under the age of twenty-one years, survived to the remaining children; and, as to the accumulation of rents of the said leasehold estates, and the produce of the said annuity that took place during the respective minorities of the children, His Honor doth declare, that such of them, who attained twenty-one years of age, took vested interests therein, and such of them, who died under twenty-one years of age, took vested interests therein, until the time of their respective deaths.

Reg. Lib. 1827. A. 1463.

1828.

PALMER v. HOLFORD.

ROLLS.
March 28.

THE testator made his will, *inter alia*, in the following words: — “ I give and bequeath the sum of 2500*l.* stock of the Governor and Company of the Bank of *England*, commonly called Bank stock (part of my capital or share in such stock), unto the said *Robert Holford* and *Charles Bosanquet*, and my friend *Richard Cooke*, and direct the same to be transferred into the names of the said *Robert Holford*, *Charles Bosanquet*, and *Richard Cooke*, or the survivor of them, or the executors or administrators of such survivor, forthwith, or as soon as conveniently may be after my decease, upon the trusts and for the purposes following; viz upon trust that they the said *Robert Holford*, *Charles Bosanquet*, and *Richard Cooke*, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, by the investment of the dividends, bonuses, and proceeds of the said capital stock or sum of 2500*l.*, as they shall respectively become due and be received, or as soon as conveniently may be afterwards, in their or his own names or name, in or upon any parliamentary security or securities (such securities to be at discretion altered or varied for any other or others of the like nature), and by like investments from time to time of the interest, dividends, bonuses, and proceeds of prior investments, raise an accumulated fund, and assign and transfer such accumulated fund unto all and every the child and children of my said son *Charles Thomas Hudson*, who shall be living at the end and expiration of the term of twenty-eight years, to be computed from my decease, other than and except an eldest or only son, such children, if

If the interest of an unborn child of a person in being does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also.

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more than one, to take equally as tenants in common; and if there be but one such child, then the whole to such one; and in case no child or children of my said son *Charles Thomas Hudson*, other than and except an eldest or only son, shall be living at the expiration of the said term of twenty-eight years, then do and shall assign, transfer, and pay the said accumulated fund unto the only child wholly, if but one, or all the children equally, if more than one, of my said son *J. S. Hudson*, who shall be living as tenants in common; and in default of any such last-mentioned child or children, unto him, my said son *J. S. Hudson*, if living; but if he shall not be living, then do and shall divide the said accumulated fund into equal moieties, and assign, transfer, and pay one of such moieties to the child wholly, if but one, or all the children equally, if more than one, of my said daughter *Catherine Charlotte Hudson*, who shall be then living, as tenants in common; and in default of such child or children, unto her my said daughter *Catherine Charlotte Hudson*, if she shall be living; but if she shall not be living, then do and shall assign, transfer, and pay such moiety in such manner as the other of the said moieties is hereinafter directed to go and be disposed of; and do and shall assign, transfer, or pay the said other and remaining moiety unto the only child, if but one, wholly, or unto all the children equally, if more than one, of my said daughter *Harriet Richardson*, who shall be then living, as tenants in common; and in default of such last-mentioned child or children, unto her my said daughter *Harriet*, if living; but if she shall not be living, then do and shall assign, transfer, and pay the same moiety in the like manner as the said first-mentioned moiety is hereinbefore directed to be paid and be disposed of: and in case there shall not, at the expiration of the said term of twenty-eight years, be any person or persons living, who, under the trusts and directions hereinbefore contained,

contained, shall become entitled to the said accumulated fund, I mean and direct that the same shall be considered as part of my residuary personal estate, and go accordingly."

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The testator died in *October* 1813. His son *Charles Thomas* had five children at the time of the date of the will, and, after his death, he had another son, who died an infant. *Charles Thomas Hudson* died in *April* 1827.

It was admitted that the accumulation, directed for twenty-eight years, might be good for twenty-one years, under the 39 & 40 G. 3. c. 98.; and the question was, whether the limitation in favour of the children of *Charles Thomas Hudson* who should be living at the expiration of the twenty-eight years, and the limitations over, if there were no such child, were good or not?

Mr. *Bickersteth* and Mr. *Duckworth*, for the Plaintiff.

The gift is not to take effect till the expiration of a gross term of twenty-eight years from the death of the testator, and, in that respect, tends to a perpetuity. The trusts of the stock and of its accumulations are for such of the children of *Charles Thomas Hudson* as shall be alive at the end of that period. Suppose *Charles Thomas Hudson* to have died at the end of a year from the testator's death, twenty-seven years more must have elapsed, before it could have been ascertained who were the persons entitled under this bequest; in other words, the gift is postponed, till more than twenty-one years after a life in being. If *Charles Thomas Hudson* had had children after his father's death, and died within six years from that event, those children, if they lived to the end of the twenty-eight years, would have been entitled to share with the children who were born in the testator's lifetime; yet their right to the enjoyment

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of the bequest would not have vested, till more than twenty-one years after their parents' death.

It is no answer to say, that, in the events which have happened, or which might have happened, the twenty-eight years will fall within the period of twenty-one years from the death of *Charles Thomas Hudson*. To render a gift valid, it is not enough that it may take effect within a life or lives in being, and twenty-one years afterwards: it must be a gift which shall of necessity take effect (if it takes effect at all), within the period prescribed by the law. Property cannot be well limited to a person not *in esse* in such a manner that the vesting of the interest in him shall or may be postponed beyond the period of his attaining the age of twenty-one years. *Jee v. Audley* (a), *Leake v. Robinson* (b), *Bull v. Pritchard* (c), *Jones v. Mackilwain* (d), *Bengough v. Edridge*. (e)

Mr. *Horne* and Mr. *Purvis*, *contra*.

The bequest is different in form and substance from all the cases cited. Even if a gift to take effect twenty-eight years after the testator's death, standing *per se*, were too remote, the limitations to *Catherine Charlotte Hudson* and *Harriet Richardson*, in case the prior limitations failed, shews that the testator meant these prior limitations to take effect during the lifetime of his two daughters; and thus the trusts will be brought within the limits allowed by law.

The MASTER of the ROLLS.

The expressed intention of the testator is, that all the children of his son *Charles Thomas Hudson*, other than an eldest son, should take, who were living at the expiration

(a) 1 *Cox*, 324.

(b) 2 *Mer.* 363.

(c) 1 *Russell*, 213.

(d) 1 *Russell*, 220.

(e) 1 *Sim.* 175.

piration of twenty-eight years, and that no person should take before that period. If *Charles Thomas Hudson* had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than twenty-one years, and the gift, therefore, is too remote and void; and the gifts over, not being to take effect until after the same period, which is too remote, are necessarily void also.

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MURRAY v. ADDENBROOK.

THE testator, General *Murray*, after giving by his will several life annuities to different persons, and, among others, to *John Murray*, eldest son of Sir *John Murray*, Bart., 60*l.* per annum, during his life, proceeded in the following words: — "These several annuities, amounting to 270*l.* per annum, are to be paid half-yearly; the first half-yearly payment to be made within six months after my decease, and which 270*l.* per annum, as the se-

ROLLS.
March 31.
April 1.
LINC. INN
HALL.
1828.
August.
1829.
Dec. 22.
1830.
Jan. 16.

In a will, the words "failing the male issue," were, upon the

whole context, construed to mean, "if there shall be no son then living."

A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of *A.*, and, failing the male issue of *A.*, to the daughters of *A.* living at the demise of such male issue; at the death of the annuitant, *A.* had no son living, but had two daughters: Held, that the gift to the daughters of *A.* was not too remote, and that they were entitled to the annuity.

The same testator gave the residue to his widow during her life, and at her demise, to the eldest surviving son of *A.* upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or, failing such male issue, to the daughters of *A.* living at the time of the demise of the last of such male issue; the only son of *A.* died under twenty-five, in the lifetime of the widow, leaving two daughters of *A.* him surviving: Held,

That, if there had been any son of *A.* living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five:

That the gift over of the residue to the daughters of *A.* was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue.

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v.

ADDENBROOK.

veral life annuities fall in, I give and bequeath to my aforesaid trustees for the use and benefit of the eldest surviving son, lawfully begotten, of the aforesaid Sir *John Murray*, Bart., and, failing the male issue lawfully begotten of the said Sir *John Murray*, Bart., to the daughters lawfully begotten of the said Sir *John Murray*, living at the demise of such male issue, in equal proportions."

The clause, by which the testator disposed of the residue of his property, was in the following words:—"The remaining produce is to be enjoyed by my wife, *Mary Murray*, during her natural life: and then I give and bequeath the aforesaid sums, at her demise, to the eldest surviving son, lawfully begotten, of Sir *John Murray*, Bart., aforesaid, upon his coming to the age of twenty-five years; the interest arising therefrom, after the demise of my said wife, *Mary Murray*, to be applied to the use of the said surviving eldest son, as to my trustees may seem most proper, till he comes to the age of twenty-five years as before specified; or, failing such male issue lawfully begotten, to the daughter or daughters of the aforesaid Sir *John Murray*, Bart., lawfully begotten, and living at the time of the demise of the last of such male issue, in equal proportions."

Sir *John Murray* had one son only, *John Murray*, who died under twenty-five, before any of the other annuitants, and did not leave any son. There were two daughters of Sir *John Murray* who survived the son.

Some time afterwards, one of the annuitants died: and now the question was, Whether, in the event which had happened, the annuity was undisposed of, and went to the testator's next of kin, or whether, by reason of the death of the only son of Sir *John Murray* before the annuitant, the annuity passed by the words of the will to Sir *John Murray's* two daughters.

Mr.

Mr. *Pemberton*, for the next of kin: —

“Failing the male issue of Sir *John Murray*,” is the event, and the only event, in which the fund is given to the daughters. The gift to them is, therefore, a disposition of personal estate, to take effect after a general failure of issue male, and, consequently, is too remote. The language is free from ambiguity; and to restrict the term *male issue* to a signification different from, and other than, that which it usually bears, would be to make a will for the testator, instead of interpreting the will which he has actually made. To support the gift to the daughters, it must be contended that *male issue* is synonymous with *sons*; but the phrase is not “the said male issue,” or “such male issue as aforesaid;” nor is there any ground on which the generality of the expression can be restricted. If this limitation is to be supported by a conjectural construction, there is scarcely a decided case of limitations void for remoteness, in which they might not have been upheld on the same principle.

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Mr. *Wakefield*, *contra*.

The question is simply, Whom did the testator intend by *male issue*? The term is not one that bears a technical and inflexible signification; and there are many cases, in which it has had meanings put on it, sometimes more, and sometimes less, restrictive. *Morse v. Lord Ormonde* (a), *Wellington v. Wellington*. (b) The objects of the testator's bounty, in his disposition of the fund provided for the annuities, appear to have been the sons and daughters of Sir *John Murray*, and the daughters are postponed only for the sake of the sons. There is no gift, either express or implied, to the issue of sons. When, therefore, the bequest to the daughters is made to depend on the failure of male issue, he meant sons —
the

(a) 5 *Mad.* 115. and 1 *Russell*, 382.

(b) 4 *Burr.* 2165.

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the persons who would take under the preceding gift. The male issue, of which he speaks, is "male issue lawfully begotten of Sir *John Murray*;" a mode of expression which, in strict propriety, is applicable only to sons, and cannot be considered as descriptive of more remote descendants. The daughters, to whom the fund is given over, are to be daughters living at the demise of such issue male; so that the testator had in view, not an indefinite failure of issue male, but a failure of issue male in the lifetime of Sir *John Murray's* daughters.

April 1.

The MASTER of the ROLLS.

The expressed intention of the testator is, that the eldest of the sons of Sir *John Murray*, who should survive the annuitant, should succeed to the annuity: and if it had happened that Sir *John Murray* had had sons, and that the first son had died before the annuitant, leaving a son, the second son, surviving the annuitant, must have taken in exclusion of the sons of the first son. The testator, therefore, has told us, that he did not mean to limit the succession of the annuity to the issue male of Sir *John Murray*, but that he contemplated a personal benefit to such son of Sir *John Murray* as should survive the annuitant; and he could hardly mean that the succession of the daughters should depend upon the failure of issue male who were not to take before the daughters. It is true, that, as between the sons, the right was to depend upon the single fact of survivorship of the annuitant, but that the daughters were to take, although they did not survive the annuitant, if they were living at the demise of the male issue: but this difference may well have escaped the attention of the testator; or he may have intended it, as the daughters were to take equally between them. It is observable,
that

that the expression "living at the demise of such male issue" is more referable to the death of an individual, than to the extinction of a whole line of issue.

1828.
MURRAY
v.
ADDENBROOK.

Upon the whole, therefore, it does appear to me that I shall best advance the intention of this testator by construing the words "failing the male issue" as if it had been written, "if there shall be no son of Sir *John Murray* then living," and by declaring, that the two daughters of Sir *John Murray* are entitled to the annuity.

The next of kin appealed against this order; and the question was argued before the Lord Chancellor.

1828.
Aug. 7.

Before the petition of appeal was disposed of, the widow of the testator died; and then the question arose on the residuary clause, whether the residue, of which the widow was tenant for life, went over upon her death to the two daughters of Sir *John Murray*, or whether the limitation to them was too remote, so that the fund devolved to the next of kin.

The next of kin presented a petition, claiming to be entitled to the residue; and both petitions were heard together.

Mr. *Pemberton*, for the next of kin.

1829.
Dec. 22.

"Failing the male issue of Sir *John Murray*" must mean a general failure of issue: whence it follows, that the gift over is too remote. *Andree v. Ward.* (a) This construction gives the words their natural import; and it is most consonant to the probable intention of the testator:

(a) 1 *Russel*, 260.

1829.

MURRAY
v.

ADDENBROOK.

testator: for he did not mean that the daughters should take any benefit, so long as there existed any person answering the description of male issue of Sir *John Murray*. Suppose that the son had died leaving a son; could the daughters have claimed in that state of circumstances, without going contrary to the express words of the bequest, and to the views by which the testator seems to have been regulated in the disposition of his property?

Even if *male issue* be considered to mean *sons*, the limitations over will not be valid. "The eldest surviving son of Sir *John Murray*" denotes, whosoever shall be the eldest surviving son of Sir *John Murray* at the time when the several annuities fall in; and, consequently, it includes all sons of Sir *John Murray*, whether born or unborn. "Failing the male issue," therefore, even in the most restricted sense which can be put upon it, must mean "failing all sons of Sir *John Murray*, whether *in esse* or not:" and the gift over will be a gift, which is to take effect on the extinction of a class of persons, some of whom are not or may be not *in esse*, and, consequently, is too remote. It is not aided by the circumstance that Sir *John Murray* had only one son, who was *in esse* at the testator's death: for where a limitation is to a class, or upon the failure of a class, if it cannot operate in favour of the whole class, or upon a failure of the whole class, it cannot take effect at all. That the class happened, *de facto*, to comprise only individuals, with reference to whom, if they had been named or specifically described, the bequest would have been good, is quite immaterial. *Leake v. Robinson* (a), *Jee v. Audley*. (b) The eldest surviving son might have been a son who was not born till long after the testator's death.

The

(a) 2 *Mer.* 388.(b) 1 *Cor.* 524.

The same observations and reasoning apply to the residuary clause, with this additional objection, that there the gift to the sons, as well as the gift to the daughters, is too remote; for the bequest is to the eldest surviving son of *A.*, upon his attaining the age of twenty-five — that is, to a person who might not be *in esse* at the death of the testator, upon his attaining twenty-five. It comes directly within the rule of *Robinson v. Leake* (a) and *Bull v. Pritchard*. (b)

1829.
MURRAY
v.
ADDENBROOK.

Mr. *Pepys*, for the personal representative of the widow, followed the same line of argument.

Mr. *Knight*, Mr. *Wakefield*, and Mr. *Flood*, for the daughters of Sir *John Murray*.

The gift of the fund appropriated for the annuities is, “to the eldest surviving son,” — that is, to the eldest son living when the annuities respectively fall in; and, failing male issue, that is, such male issue, or, in other words, failing sons, to the daughters of Sir *John Murray*. In many cases, words, which, taken *per se*, imported a general failure of issue, have been restricted to a failure of issue of a particular class, or to a failure of all issue within a limited period. *Lyde v. Lyde* (c), *Morse v. Lord Ormonde* (d); and both the particular turn of the phraseology of this bequest, and the general scope of the will, show, that, in the present case, “failing issue male” ought to be construed with reference to the particular species of issue male to which he had confined his bounty. The gift over to the daughters will unquestionably include daughters coming into *esse* after the death of the testator, as well as those born in his lifetime;

(a) 2 *Mer.* 388.

(b) 1 *Russell*, 213.

(c) 1 *T. R.* 595.

(d) 1 *Russell*, 382.

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lifetime; but the only persons, who could take under the description, would be those daughters who were *in esse* when the failure of male issue took place, and all born afterwards would be excluded. *Whitbread v. St. John* (a), *Walker v. Shore*. (b) But that failure of issue is a failure of issue which must take place before the annuity falls in; and, consequently, within the limits of an existing life. A point of time is fixed with respect to each annuity, when the interest must vest absolutely, either in one person or another; that point of time, is the expiration of the annuity—in other words, the termination of a life in being. Upon the death of the annuitant, the eldest surviving son (if there had been such a son) would have taken; if there was no such son, then the daughters were to take. It is not a fair representation of the case, to say, that the limitation to the daughters is expectant on the failure of a class which includes, or may include, persons not *in esse*; for, though sons of Sir John Murray, not *in esse* at the testator's death, might have taken under this will, the gift to the daughters is not by way of remainder, expectant upon the determination of the interest given to the sons, but is a limitation, which is to take effect, if, at the death of the annuitants, there be no son. If there had been a son then living, he would, unquestionably, have taken the annuity absolutely, and, in no subsequent event, could any portion of it have devolved to the daughters. It is clear, therefore, that the limitation to the daughters is alternative or substitutionary, and not by way of remainder.

Even if “failing male issue” be not restricted to a failure of sons, still there is a period fixed, within which it must take place: that period is the determination of the life of the annuitant: and, therefore, the contingency

is

(a) 10 Ves. 152.

(b) 15 Ves. 122.

is not too remote. A limitation over, upon a failure of issue within the period of lives in being, is good.

1829.

MURRAY
v.
ADDENBROOK.

The case would have been apparently stronger in favour of the next of kin, if the bequest had been, after the death of the annuitant, to the issue male of Sir *John Murray*, and, failing issue male, to his daughter: yet even then the limitation would have been good. For "failing issue male" would be equivalent to "in default of issue male;" and in *Knight v. Ellis (a)*, a bequest after the death of *A.* to his issue male, and, in default of such issue, to the testator's nieces, was sustained.

On the residuary bequest there is still less doubt. There the period of distribution is the death of the widow; if there is any son then living, he takes the fund, and takes it absolutely; if there is no *such* issue male, that is, no son, it goes to the daughters who were living at the time when the last surviving son died. The contingency must be determined either the one way or the other, within a period much short of a life in being, and twenty-one years afterwards: it must necessarily be ascertained the moment the widow dies. The word "such" expressly restricts the issue male, the event of whose failure is provided for, to the issue male before spoken of, namely, sons: and the limitation over, in the event of the failure of such issue male, is alternative in its very form, for it is introduced by the word "or."

As to the objection, that the residue does not vest in the eldest surviving son till he attains twenty-five, the answer is, that, though the principal is not to be handed over to him, till he reaches that age, yet the whole of the

(a) 2 Bro. C. C. 570.

1829.

 MURRAY
 v.
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the dividends are given to him from and after the decease of the widow: and the rule is that, though a bequest is so expressed as to have the form of a gift at a future time, yet if there be a direction to apply the whole of the interest for the benefit of the legatee, before the time of payment arrives, the legacy vests as soon as the right to the interest commences. *Hanson v. Graham* (a), *Branstrom v. Wilkinson*. (b)

Mr. Pemberton, in reply.

As the bequest is to daughters living at the demise of such male issue, or of the last of such male issue, the gift is not to persons *in esse*, but to a class including persons not *in esse*: and, therefore, it cannot be good, unless the failure of issue be restricted in some mode or other. To argue on the supposition, that the bequest of the annuities to the daughters is to take effect on the death of the several annuitants, and that of the residue on the death of the widow, is to assume the very point in question: for there is no bequest to the daughters, except "failing male issue" in the one case, and "failing such male issue" in the other; and the construction, for which we contend, is, that, under that gift, they were to take nothing, till after a general failure of Sir John Murray's male issue.

None of the cases, in which the meaning of the words "male issue" has been restricted, bear any resemblance to the present. *Lyde v. Lyde* does not seem to have been much approved of by Sir Thomas Plumer in *Lyon v. Mitchell* (c); and that Judge expresses some doubt as to the soundness of the decision in *Knight v. Ellis*. (d)

The

(a) 6 Ves. 239—249.

(c) 1 Mad. 485.

(b) 7 Ves. 421. *Jones v. Mac-*

(d) 2 Bro. C. C. 570.

Kilwain, 1 Russell, 220.

The gift of the residue being to the eldest son upon his coming to the age of twenty-five years, nothing could vest in him, till the prescribed period arrived: and the direction to the trustees to apply the interest for his benefit, after the death of the tenant for life, till he attains that age, will not control the preceding words, or make the bequest vest at an earlier period than that which the testator has pointed out so plainly. In *Batsford v. Kebbell* (a), a testatrix gave a legatee the dividends of stock till he attained thirty-two, and directed the principal to be then transferred to him; and it was held that the legacy did not vest till he attained thirty-two. In *Leake v. Robinson* (b), the shares of the children were held not to vest, till they respectively attained twenty-five, though the dividends were to be applied to their maintenance in the mean time.

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MURRAY
v.
ADDENBROOK.

The LORD CHANCELLOR.

1830.
Jan. 16.

There are two petitions in this case, arising out of different dispositions contained in the will of *Thomas Murray*: the one was an original petition, the other was a petition by way of appeal from the decision of the present Master of the Rolls. The former relates to the disposition of the residue; and it will be convenient, in considering the construction of this will, to commence with adverting to that disposition.

Sir *John Murray*, who is mentioned in the will, had a son and two daughters. The son died in the lifetime of the testator's widow; the daughters survived; and now, on the death of the widow, they claim that property

(a) 3 *Ves.* 363.

(b) 2 *Merivale*, 363.

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perty which the widow took as residue for her life: and the question is, whether, upon the terms made use of by the testator, they are entitled. The intention of the testator to my apprehension is sufficiently clear. The doubt will be, whether the terms of this devise are such, as will enable us to carry that intention into effect, without infringing any rule of law.

The testator begins his disposition of the residue with these words: "The remaining produce is to be enjoyed by my wife *Mary Murray* during her natural life." The life estate is thus given to the widow. He then says, "and then I give and bequeath the aforesaid sums at her demise to the eldest surviving son lawfully begotten of Sir *John Murray*, Bart. aforesaid." There is no dispute with respect to the meaning of the term "surviving;" here it must mean living at the death of the widow, that is, living when the event takes place, upon which the fund is to be distributed or given over. Then he goes on thus: "upon his coming to the age of twenty-five years." It is said this is too remote; because a son of Sir *John Murray* might be born after the death of the testator, and that son is not to take, until he attains the age of twenty-five years. The observation would be correct, if the will had stopped here. But the will goes on thus: "the interest arising therefrom, after the demise of my said wife *Mary Murray*, to be applied to the use of the said surviving eldest son, as to my trustees may seem most proper, till he comes to the age of twenty-five years as before specified." It appears to me, that, in this clause, the whole of the interest is given to the son: the whole of it is to be applied to the use of the son, though the manner, in which it is to be so applied, is left to the discretion of the trustees; and, therefore, as the whole of the interest is given immediately upon

upon the death of the widow, the eldest surviving son would, upon her death, have taken a vested interest in the residue. Therefore, the gift to the son is not too remote.

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The will proceeds thus: "Or failing such male issue lawfully begotten, to the daughter or daughters" as therein mentioned. Now this does not seem to me to be intended as a limitation to take effect after the enjoyment of another particular estate, but it is an alternative disposition. "Or failing such issue," that is, such male issue—or, in other words, in the event of there being no son surviving,—in that case, the testator gives the fund to the daughters. It appears to me, therefore, impossible to put any other interpretation upon the bequest, than that which I have stated, consistently with the obvious intention of the party, and the grammatical construction of the terms which are employed. If there is no son of *Sir John Murray* living at the death of the widow, the daughters are to take: but to what daughters is the property given? "To the daughter or daughters of the aforesaid *Sir John Murray*, Bart. lawfully begotten and living at the time of the demise of the last of such male issue in equal proportions:" that is, to the daughters who are living at the time of the death of the last son, which son must die in the lifetime of the widow, otherwise that son would be a surviving son and would have taken. Thus, the bequest is limited to the period of the lifetime of the widow.

It appears to me, therefore, that the limitation of the residue to the daughters is not too remote, and that the intention of the testator, as expressed in the terms he has used, is obviously this,—that the eldest son surviving the widow shall take, and if there be

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no son surviving the widow, that the daughters, who are living at the death of the last son who died in the lifetime of the widow, shall take the property in equal shares.

We come next to consider the construction of the clause to which the petition of appeal relates; and it is impossible to consider this part of the will, without finding that the residuary clause throws light upon the construction which ought to be put upon the preceding bequest. The first clause, I admit, is expressed in terms much more general than the residuary clause, and wants some of those particular words, which mark, to my mind, in the strongest manner, the intention of the testator; yet it seems to me impossible to construe the first clause, taking it in connection with the last clause, so as to give it a different meaning, or to consider that the testator intended a different disposition of this portion of his property from that which he has made of the residue. The differences between the two clauses are these. In the last clause we have "Or failing such male issue lawfully begotten:" in the first clause, "and failing the male issue lawfully begotten;" substituting *and* for *or*, and leaving out the word *such*. In the residuary clause the gift is to daughters "living at the demise of the last of such male issue;" and in the first clause, it is to daughters "living at the demise of such male issue." There is no difference in substance between the two bequests: the one cannot, in my mind, be construed differently from the other.

In the clause to which I am now adverting, the testator, having before given certain annuities for life, amounting to the aggregate sum of 270*l.* a year, disposes

poes of those annuities as they should successively fall in; "which 270*l.* per annum," he says, "as the several life annuities fall in, I give and bequeath to my aforesaid trustees for the use and benefit of the eldest surviving son lawfully begotten of the aforesaid Sir *John Murray, Bart.*" (the same expression which is used in the other bequest,)—that is, the eldest son of Sir *John Murray, Bart.*, who shall be living at the time when those respective annuities fall in, — "and, failing the male issue lawfully begotten of the said Sir *John Murray, Bart.*, to the daughters lawfully begotten of the said Sir *John Murray, Bart.*" In this clause, as in the other, the meaning is, that, in the event of there being no son surviving, the property is to go to the daughters. The word "failing," as connected with "issue," has, demonstratively, I think, that meaning in the residuary clause; and it is fair, therefore, to give the same construction to it in this clause, particularly when we consider that, even if the limitation were construed as a limitation to take effect on an indefinite failure of issue, yet the issue are not to take: it is only the surviving son who takes. Why then should the daughters have been postponed, till after an indefinite failure of a class of issue, which class of issue in the mean time were not intended to take? Besides, the gift is to the daughters living at the *demise* of such male issue. The testator contemplated, therefore, that the daughters would be living at the time when the failure of male issue, which was present to his mind, was to take place; he contemplated that the failure, of which he spoke, would take place in the lifetime of the daughters. It is not reasonable, therefore, to suppose that he contemplated a general failure of issue.

Such were the observations made by the Master of the Rolls, when the case was before him: and they are
greatly

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greatly strengthened and confirmed, when we apply to the construction of this clause, what appears to me to be the clear and obvious construction of the residuary clause; the phraseology being the same, with the exception only of the interposition of one or two small words, which, in the latter, mark more precisely and definitely what the testator meant. The appeal must be dismissed: and on the original petition it must be declared, that the daughters are entitled to take, on the death of the widow.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

LEMAN v. WHITLEY.

1828.

Rolls.

April 24.

May 5.

THE Plaintiff, by deeds of lease and release, dated the 21st and 22d of *December*, 1819, conveyed the estate in question to his father; in consideration, as it was expressed in the deed of release, of a sum of 400*l.* paid by the father to the Plaintiff. The bill alleged, that the Plaintiff, while in distressed circumstances, and not in good credit, being desirous to raise money upon mortgage of this estate, was advised by the attorney, who was employed as well by the father as by the Plaintiff, that he could much more readily procure the money on mortgage, if it appeared that the estate, on which the security was to be given, was the father's property, and that the money was raised for the use of the father, who was in good credit, than if the transaction was understood to be a dealing with the Plaintiff; that the attorney recommended, therefore, that the Plaintiff should convey the

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards and before any money was raised, having by a will, subsequent to the conveyance, made a general

devise of all his real estates: the case is within the statute of frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid.

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the estate to the father, so that it should appear to be his property; and that the deeds of lease and release to the father were prepared and executed in pursuance of that advice, with the consent of the father, but that no part of the alleged consideration had been paid.

The father died in the month of *May* 1820, having, by his will, made subsequently to the execution of the deeds of lease and release, devised all his real estates, in general words, to an infant son of the Plaintiff, with remainders over.

It appeared that steps had been taken by the attorney towards raising money on mortgage in the name of the father, but that no mortgage was completed in his lifetime. The attorney, having possession of the title deeds, was made a defendant in the cause, and by his answer admitted the facts as stated in the bill. He had likewise been examined as a witness for the Plaintiff; and his evidence was to the same effect.

The bill prayed, that the devisees of the father might be declared to be trustees for the Plaintiff; that they might account to him for the rents and profits since the father's death; and that the estate might be reconveyed to him.

The evidence was read *de bene esse*; and the question was, whether on such facts so disclosed by parol testimony, the Court could declare a trust in favour of the Plaintiff?

Mr. *Treslove* and Mr. *Crompton*, for the Plaintiff.

There are many circumstances that will suffice to take a case out of the provision of the statute of frauds, which requires all declarations of trust as to lands to be
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in writing. "There is," says Lord *Hardwicke*, in *Willis v. Willis* (a), "another way of taking a case out of the statute, and that, by admitting parol evidence, within the rules laid down in this court, to shew the trust, from the mean circumstances in the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser." *Cripps v. Jee* (b), *Maxwell v. Montacute* (c), *Lady Tyrrell's case* (d), *Lady Bellasis v. Compton* (e), *Woodhouse v. Brayfield* (f), *Lloyd v. Spillet* (g), *Cottingham v. Fletcher* (h), *Young v. Peachey* (i), *Birch v. Blagrove* (k), *Lench v. Lench*. (l) Unquestionably evidence might be received that the purchase-money, which is stated in the deeds as the consideration of the conveyance, was never paid. Why was it not paid? Because it never was the intention of the parties that any consideration should pass from the father to the son, and the transaction was merely colourable. The true facts of the case are thus brought properly before the Court; and, according to those facts, and not according to the tenor of the formal conveyance, must the rights of the parties be declared.

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 . v.
 WHITLEY.

Mr. Beames, contra.

None of the cases, which have been cited, resemble the present. In some of them there was fraud; in some of them there was mistake; in some of them there was evidence in writing that the written conveyance did not disclose the true nature of the transaction, and the true intent of the parties: but in no case has parol evidence been received in order to raise a trust contrary

(a) 2 *Atk.* 71.

(b) 4 *Bro. C. C.* 472.

(c) *Prec. in Chan.* 526.

(d) *Freem.* 304.

(e) 2 *Vern.* 294.

(f) 2 *Vern.* 307.

(g) 2 *Atk.* 148. and *Barnard.* 384.

(h) 2 *Atk.* 155.

(i) 2 *Atk.* 254.

(k) *Amb.* 264.

(l) 10 *Ves.* 511.

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contrary to the effect of a written instrument, where, as here, neither fraud nor mistake is alleged, and where all that appears in writing is in opposition to the claim set up by the bill.

May 5.

The MASTER of the ROLLS.

The question in this cause would regularly have arisen upon an objection to the admissibility of parol evidence of the alleged trust. There can be no doubt of the moral honesty of the claim made by this bill. But the question is, whether the Plaintiff can be relieved consistently with the provisions of the statute of frauds, which, although it may bear hard upon the plaintiff in the particular case, was certainly called for by the public interest.

There is here no pretence of fraud, nor is there any misapprehension of the parties with respect to the effect of the instruments. It was intended that the father should by legal instruments appear to be the legal owner of the estate. There is here no trust arising or resulting by the implication or construction of law. The case of *Cripps v. Jee* is the nearest to this case in its circumstances. There, the estate being subject to certain incumbrances, the grantor mortgaged the equity of redemption by deeds of lease and release to two persons of the name of *Rogers*, as purchasers, for a consideration stated in the deed; the real intention of the parties being that the *Rogerses* should be mere trustees for the grantor, and should proceed to sell the estate, and, after paying the incumbrances, should pay the surplus money to the grantor. In the book of accounts of one of the *Rogerses* there appeared an entry in his handwriting of a year's interest paid to an incumbrancer on the estate, on account of the grantor,
and

and other entries of the repayment of that interest to *Rogers* by the grantor; and there was also evidence of a note and bond given by the *Rogerses* to a creditor of the grantor, in which they stated themselves to be trustees of the estate of the grantor. Lord *Kenyon* held, that, this written evidence being inconsistent with the fact that the *Rogerses* were the actual purchasers of the equity of redemption, further evidence was admissible to prove the truth of the transaction. Unfortunately, there is here no evidence in writing, which is inconsistent with the fact that the father was the actual purchaser of this estate; and it does appear to me, that to give effect to the trust here would be in truth to repeal the statute of frauds.

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 LEMAN
 v.
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Considering myself bound, therefore, to treat this case as a purchase by the father from the Plaintiff, there does, however, arise an equity for the Plaintiff, which, consistently with the facts stated and proved, and under the prayer for general relief, he is entitled to claim. It is stated and proved that no part of the alleged price or consideration of 400*l.* was ever paid by the father to the Plaintiff; and the Plaintiff therefore, as vendor, has a lien on the estate for this sum of 400*l.*; and the decree must be accordingly.

1828.

ROLLS.
April 24.
May 5.

FODEN v. FINNEY.

Money in Court, belonging to a married woman, if less than 200*l.*, will be ordered to be paid to the husband, though she has been deserted by him and opposes the petition.

A PETITION was presented in the name of *Thomas Foden* and *Charlotte* his wife, praying that the sum of 84*l.* 8*s.* 9*d.*, three per cent. stock, which was the wife's share of a fund in court, might be transferred to the husband.

Mr. *Girdlestone*, junr., for the petition.

Mr. *Wakefeld* stated, that he appeared for the wife to oppose the petition. Her husband had deserted her, and, for ten years, had not contributed any thing to her support: her name had been used in the petition without her permission; and, far from concurring in the application, she was anxious to prevent any part of the money from coming into the hands of her husband.

In reply, it was said, that, the sum being under 200*l.*, the consent of the wife was not requisite. The fund was, at law, the property of the husband; and this Court never created an equity in favour of the wife, except where the sum amounted to 200*l.* or upwards.

The petition stood over, in order that it might be ascertained whether there were any authorities on the subject.

On a subsequent day Mr. *Wakefeld* referred to *Elsworthy v. Wickstead* (a), where, the petition being in the name

(a) 1 *Jac. & Walk.* 69.

name of the husband and wife, the trustees suggested that the wife did not concur in it; and Sir *Thomas Plummer* made the order, expressly on the ground that he must presume the petition to be presented with the concurrence of the wife, unless the contrary were proved. That seemed to imply, that, if it had been proved that the wife did not concur, the Court would not have made the order: and here it is an admitted fact, that the wife is most adverse to this petition. In 1806 a general order was made by Lord *Erskine* (a), directing that, if any unmarried woman, to whom any sum under 200*l.* had been ordered to be paid, married before she had received the money, the Accountant-General, upon a proper affidavit being made, should draw a draft for the amount payable to the woman or her husband. The husband, therefore, is not considered as having an unqualified and exclusive right to the money of his wife, even when it is under 200*l.* In general the equity of the wife is merely to have a part of the fund settled upon her, but if she has been deserted by her husband, the Court will give her the whole. The extent, to which the Court interferes in such a case, is founded on the fact of desertion; and desertion gives the wife equitable rights against the legal rights of her husband greater than she would otherwise have. Why, therefore, should it not, on the ground of desertion, secure for her benefit a fund, which the husband, if he were maintaining her, would be permitted to deal with as he pleased?

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v.
FINNEY.

Ultimately, the Master of the Rolls made the order for the payment of the money to the husband.

Reg. Lib. 1827. A. 1607.

(a) *Beames' Orders*, 464.

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May 5, 6.

AULT v. GOODRICH.

A general dissolution of partnership between *A.* and *B.* does not operate to discharge *A.* from his responsibility for the subsequent conduct of *B.* in respect of the engagements of the partnership with third persons, made prior to the dissolution.

If *A.* and *B.*, as partners, engage in a speculation with *C.*, *A.* is answerable to *C.* in respect of the dealings of *B.* in the joint speculation.

A PARTNERSHIP, consisting of *Wilcox* the elder and *Wilcox* the younger, had been interested in a joint speculation in timber to the extent of one third part; and, the partnership having been dissolved, and *Wilcox* the elder having died before the joint speculation was wound up, the following questions arose:

First, whether the partnership of the *Wilcoxes*, and consequently the estate of *Wilcox* the elder, was to be answerable for all sales and receipts by *Wilcox* the younger, in respect of the speculations in timber, which took place during the continuance of his partnership with *Wilcox* the elder: secondly, whether the estate of *Wilcox* the elder was to be answerable in respect of the dealings of *Wilcox* the younger in the joint speculation, after the dissolution of his partnership with *Wilcox* the elder: thirdly, how far, under the circumstances of the case, the estate either of *Wilcox* the younger or of *Wilcox* the elder was protected from responsibility by the statute of limitations.

The facts, on which these questions arose, are fully stated in the judgment pronounced at the hearing of the cause.

Mr. Pepys and Mr. Pigott, for the Plaintiff.

Mr. Horne, Mr. Rolfe, and Mr. Barber, for the different Defendants.

The

The MASTER of the ROLLS.

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In 1812, the Plaintiff, the Defendant *Palmer*, and two persons of the name of *Stephen Wilcox* the elder and *Stephen Wilcox* the younger, entered into a contract for the purchase of certain timber trees then standing in a wood called *Newhurst*, for which they were to pay a sum of 9500*l.* The two *Wilcoxes* were then in partnership together as timber merchants, and they were to be interested, as partners, in one third of the speculation; the Plaintiff was to be interested in another one third; and the Defendant *Palmer*, in the remaining one third. The whole of the purchase-money, except about 1000*l.*, was paid by the *Wilcoxes*, and the remaining 1000*l.* was paid by the Plaintiff and the Defendant *Palmer*, as appears by the account hereinafter referred to. Each of the three parties concerned took to themselves certain trees, which, by the same account, seem to have been of the value of 400*l.* The sales of the remainder of the trees were principally conducted by *Stephen Wilcox* the younger. The two *Wilcoxes* dissolved their partnership in the month of *April* 1814. *Stephen Wilcox* the elder died in 1815, and *Stephen Wilcox* the younger died in 1818.

The present bill was filed in 1822 against the Defendant *Palmer*, and against the real and personal representatives of the two *Wilcoxes*, for a general account of the dealings and transactions with respect to this joint speculation. The real and personal representatives of the *Wilcoxes* have insisted upon the statute of limitations. It appears on the evidence of a *Mr. Higgett*, that he was solicitor for the executors of *Stephen Wilcox* the younger; and that, in that character, he was employed, in the year 1819, to make out from the books of account, letters, papers, and memoranda then in the possession

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possession of those executors, the accounts of the joint speculation; and that he accordingly made out an account, which is proved in the cause, by which it appeared that a balance of 562*l.* was then due to the Plaintiff, and a balance of 117*l.* 10*s.* was then due to the Defendant *Palmer*. He says that this account was made out in consequence of the urgent applications of the Plaintiff and the Defendant *Palmer*, and that he carried it to the Defendant *Palmer*, and left it with him for the purpose of being compared with his books, but that he did not deliver it to *Palmer* as an admitted account; for that, being collected from the different books and papers, and not from any regular and complete account, it was not, in his opinion, entirely to be depended upon.

There is other evidence to prove that the accounts of the joint speculation were open and unsettled at the death of *Stephen Wilcox* the younger, to which it does not appear to me to be necessary to refer more particularly; because, after the making out and delivering of this account by the executors of *Stephen Wilcox* the younger within six years before the filing of the bill, the statute of limitations is wholly out of the question, as far as regards the estate of *Stephen Wilcox* the younger.

It is said, however, that the estate of *Stephen Wilcox* the younger is considered to be insolvent, and that the real object of this suit is to reach the estate of *Wilcox* the elder; and the Plaintiff insists that the estate of *Wilcox* the elder is answerable to the joint concern in respect of all the dealings and transactions of *Wilcox* the younger, which took place during the life of *Wilcox* the elder, notwithstanding the dissolution of the partnership between the *Wilcoxes* in 1814. *Primâ facie* it must be intended, that, the partnership being interested in one third

third of this joint speculation, all sales and all receipts of money by *Wilcox* the younger, during the continuance of the partnership, were partnership transactions; and it appears by the evidence of *William Lowndes*, in answer to the third interrogatory, that he was engaged by *Wilcox* the elder to superintend the management and disposal of the timber which was the subject of this speculation, on behalf of all parties interested in the purchase; and, in answer to the tenth interrogatory, *Lowndes* produces certain books of account, which he describes as containing the accounts of the two *Wilcoxes*, and as having been kept by them during the continuance of the partnership, and subsequently, by *Wilcox* the younger to the time of his death. These books, he says, contain accounts of the sales of the timber so purchased upon joint speculation; but whether they contain all the accounts of such sales he does not know. I have already observed, that, in the absence of all evidence upon the subject, it must have been intended that the sales by *Wilcox* the younger were sales on the partnership account; but here is direct evidence to that effect. The estate of *Wilcox* the elder, therefore, is plainly responsible for the dealings and transactions of *Wilcox* the younger during the continuance of their partnership, unless protected by the statute of limitations.

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But the Plaintiff contends that the estate of *Wilcox* the elder is equally responsible for all such dealings and transactions, which took place after the dissolution of the partnership between the *Wilcoxes*, and during the life of *Wilcox* the elder. The general dissolution of partnership between the *Wilcoxes* did not necessarily put an end to their partnership in respect of past transactions; and, there being no evidence of any new stipulation or agreement between any of the parties engaged in the joint speculation in consequence of the
general

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general dissolution of the partnership between the *Wilcozes*, I am bound to conclude that the other parties interested continued to rely upon the joint responsibility of the two *Wilcozes* in respect of the dealings of *Wilcox* the younger, until that responsibility determined by the death of *Wilcox* the elder.

With respect to the statute of limitations, as applied to the estate of *Wilcox* the elder, there having been no dealings within six years before the filing of the bill, and no admission on the part of his representatives which can take the case out of the statute, the protection of his estate would have been complete. But, *Wilcox* the elder having devised his estate upon trust to pay his debts, it follows, according to the doctrine now settled, that the statute of limitations cannot be pleaded in bar of demands which had legal existence at the time of his death; and the partnership accounts must therefore be taken.

It must be declared that the estate of *Wilcox* the elder is responsible to the Plaintiff and the Defendant *Palmer*, to the extent of any balance which was respectively due to them at the death of *Wilcox* the elder.

1828.

ROLLS.

May 5, 6. 8.

June 9.

KIRKE v. KIRKE.

THE testator, *John Kirke*, made the following will, bearing date the 20th of *September*, 1809, and duly executed and attested so as to pass freehold estates: —

“ This is the last will and testament of me, *John Kirke*, of *East Retford*, in the county of *Nottingham*, Esq. Whereas, in and by certain articles of agreement made in contemplation of my intended marriage with *Ann Mervyn Richardson*, third daughter of *Sir W. Richardson*, of *Augher*, &c., and which marriage has since been duly had and solemnized, bearing date on or about the 24th day of *April*, 1798, at which time I was a minor under the age of twenty-one years, it was agreed that the said *Sir W. Richardson* should execute a bond for 1000*l.*, payable to the *Rev. Hugh Nevin*, of *Clogher*, in the said county of *Tyrone*, and *George Mason*, Esq.

A testator made his will, duly executed and attested so as to pass real estates, by which he gave to his younger sons 4000*l.* each, and to his daughters 3000*l.* each, payable exclusively out of his real estates; he afterwards obliterated the words “ four ” and “ three,” and wrote over them “ three ” and “ one; ” but the will as was not re-executed or

republished; he subsequently made a codicil, signed by him, but not executed or attested so as to pass real estates, by which he reduced the portions given to the younger sons and daughters, according to the alterations in the will: The younger sons and daughters were held to be entitled to the portions originally given to them by the will.

A testator devised certain lands to his wife for life, and after her decease, to his eldest son in fee, chargeable, nevertheless, in aid of the other estates thereafter devised to him, with the payment of the several sums of money thereafter bequeathed to the testator's younger sons and daughters: then, after a specific bequest of personal chattels, he devised all his other real estates to trustees, until his eldest or some other son should attain twenty-one, subject to the payment of the several sums of money thereafter bequeathed to his younger sons and daughters, with a direction that his trustees should in the mean time apply the rents and profits to the maintenance, education, and advancement of all his younger sons and daughters; and then he gave to his younger sons 4000*l.* each, and to his daughters, 3000*l.* each, to be paid to them at twenty-one by his eldest son, if he should attain twenty-one, or by such other son as should attain twenty-one, and become entitled to his real estates by virtue of his will, and he expressly charged all his real estates, including the remainder in fee of the lands devised to his wife for her life, with the payment of the said several sums of money so given to his younger sons and daughters: the testator died intestate as to the residue of his personal estate. — Held, that the personal estate of the testator was not applicable to the payment of these legacies or portions.

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as and for the portion and fortune of the said *Anne Richardson*, my now wife, and should be handed over to me on my well, truly, and sufficiently settling, securing, and confirming unto my said then intended and now wife, one annuity of 150*l.*, yearly to be issuing and payable out of a good and sufficient and substantial freehold property; and whereas the making of such settlement, and thereby securing the said annuity to my dear wife, has been postponed for various reasons of consequence to myself and family, and is likely to be further postponed, yet I am desirous, in the event of my death happening before the same settlement can be made and executed, that a more ample provision be made and secured to her my said wife in lieu thereof, in manner hereinafter contained; now, therefore, I do hereby—in lieu, and bar, and in full satisfaction of and for the annuity of 150*l.* in the said recited articles agreed to be secured to my said wife; and in lieu, bar, and full satisfaction of and for all dower and thirds, and right and title of dower and thirds at common law, or otherwise, which my said wife can or may have, claim, or be entitled unto, into, out of, upon, or from all and every my real and personal estates whatsoever,—give and devise unto my said wife, *Ann Mervyn Kirke*, all that my farmhouse, with the several barns, stables, outbuildings, yards, gardens, orchards, and appurtenances thereto belonging and adjoining, situate, standing, and being in *East Markham*, in the county of *Nottingham*, in the occupation of *W. Stanniland*, and also all that my farm of closes, inclosures, pieces and parcels of ancient and new inclosed grounds, and several parcels of open arable land and common rights, situate, lying, and being in the parish of *East Markham* aforesaid, or in the precincts and territories thereof, also in the occupation of the said *W. Stanniland*, at the present yearly rent or sum of 215*l.*, and, also, all that messuage wherein I now reside, with the coach-house, stables, outbuildings, yard, garden,
and

and appurtenances thereto adjoining and belonging, situate, standing, and being in *East Retford* aforesaid, in a place called the *Square*, to hold the said farm-house, farm, messuage, and hereditaments hereinbefore mentioned, with their and every of their appurtenances, unto the said *A. M. Kirke*, and her assigns, for and during the term of her natural life; and from and immediately after her decease, I give and devise all and singular the said farm-house, farm, messuage, and hereditaments hereinbefore described unto my eldest son *William Kirke*, to hold the same unto the said *W. Kirke*, his heirs and assigns for ever, chargeable, nevertheless, in aid of my other estates hereinafter devised to him at his age of twenty-one years, with the payment of the several sums of money hereinafter bequeathed and made payable to all his brothers and sisters. I also give and bequeath to the said *Ann M. Kirke* all and singular my household goods and furniture, plate, linen, china, brass, pewter, iron, and other goods and personal property, estate and effects, which are within or about my said dwelling house, or within or about any other house and offices in which I may happen to reside at the time of my decease, and, also, all my horses and carriages, to hold the same unto the said *Ann M. Kirke* for ever for her own use and absolute disposal. I give and devise unto my friends *Sir Thomas Wollaston White*, Baronet, and *James Mervyn Richardson*, brother of my said wife, all and singular other my messuages, cottages, farms, closes, inclosures, lands, tenements, and hereditaments, and real estates whatsoever, not hereinbefore devised, situate, lying, and being in *East Markham* and *East Retford* aforesaid, or either of them, and in the parishes of *Ordsall* and *Clarlborough*, or elsewhere, in the county of *Nottingham*, and all other my real estates whereof or wherein I have a disposing power, to hold the same to the said *Sir Thomas Wollaston White* and *James Mervyn Richardson*, and the survivor of them, and the heirs of such survivor, until

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until my said eldest son, *W. Kirke*, shall attain the age of twenty-one years ; but in case the said *W. Kirke* shall not live to attain the age of twenty-one years, then until the next in succession of my sons, who shall live to attain the age of twenty-one years, shall have attained that age, upon the trusts, and for the purposes hereinafter mentioned, expressed, and declared of and concerning the same ; and when and as soon as my said eldest son, *W. Kirke*, shall have attained the age of twenty-one years, I give and devise all and every the messuages, cottages, farms, closes, inclosures, lands, tenements, and hereditaments, and real estates, hereinbefore last mentioned to be devised to the said Sir *T. W. White* and *J. M. Richardson* in trust as aforesaid, unto him my said son, *W. Kirke*, and to his heirs and assigns for ever ; subject, nevertheless, to and with the payment of all and every the sums of money, legacies, or portions hereinafter bequeathed to all and every my younger sons and daughters ; and, in case my eldest son, *W. Kirke*, shall not live to attain the age of twenty-one years, then I give and devise all and every my last mentioned messuages, cottages, farms, closes, inclosures, lands, tenements, and hereditaments unto the next of my sons in succession, who shall live to attain the age of twenty-one years, and to his heirs and assigns for ever, to take effect in possession when and as soon as such son shall attain his age of twenty-one years, but subject nevertheless to and with the payment of all and every the sums of money, legacies, and portions herein bequeathed to all and every my remaining younger sons and daughters ; and it is my will and meaning, and I do hereby declare, that the real estates hereinbefore given and devised to the said Sir *Thomas Wollaston White* and *James M. Richardson*, until my said eldest son *William Kirke* shall attain his age of twenty-one years, and, in case of his death under that age, until the next in succession of my sons, who shall live to attain the age of twenty-one years, shall have

have attained that age, are so given and devised unto them the said Sir *T. W. White* and *J. M. Richardson* upon trust to receive the rents, issues, and profits of the same from time to time as the same shall become payable, during the legal operation of the said devise to them, and to pay, apply, and dispose thereof in the maintenance, education, support, clothing, bringing up, and advancement in the world of all my younger children whatsoever, as well those born in my lifetime as after my decease, and as well males as females, in such manner as my said trustees or trustee for the time being shall think proper, until my son *William Kirke* shall attain his age of twenty-one years, if he shall live to attain that age, and if not, until the next in succession of my sons, who shall live to attain the age of twenty-one years, and become possessed of the said estates by virtue of the said devise for that purpose hereinbefore contained, shall have attained that age; and I will and declare, that, in the application of the said rents, issues, and profits, my said trustees shall not be confined or restrained to any equal or proportionable distribution or application of the same, but shall act therein entirely by their own discretion, and may from time to time pay or apply for the maintenance, education, support, clothing, or use of one or more of the said children a greater sum than they may think proper for the others and other of them, without being accountable for any such disproportionate or unequal application, as I trust and believe that they will act in this matter as they think will best conduce to the future welfare of my children, having reference to their prospects in life, and the fortunes they will severally be entitled to. I give and bequeath to all and every my younger sons, that shall be living at the time of my decease, or shall be afterwards born alive, the sum of ^{three} ~~four~~ thousand pounds a piece, and to all and every my daughters, that shall be living at the time of

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my decease, or shall be afterwards born alive, the sum of ^{one} ~~three~~ thousand pounds a piece, all which before-named sums of ^{three} ~~four~~ thousand pounds and ^{one} ~~three~~ thousand pounds I will shall be paid by my son *W. Kirke*, his heirs or assigns, if he shall live to attain the age of twenty-one years, and if not, then by such of my sons in succession as shall first attain the age of twenty-one years, and become possessed of my said real estates by virtue of this my will, to my said younger sons and daughters respectively entitled thereto, when and as he, she, or they shall respectively attain the age of twenty-one years, with interest for the same sums severally and respectively in the mean time, after the rate of 4 per cent. per annum, to be paid by the said *William Kirke*, or other sons so entitled to my said estates as aforesaid, unto the said Sir *T. W. White* and *J. M. Richardson* for the use of all and every such younger sons and daughters as aforesaid, and to be by them or the survivor of them paid and applied and disposed of in the maintenance, education, support, clothing, bringing up, and advancement in the world of my said younger sons and daughters severally and respectively, until they shall severally and respectively attain their said ages of twenty-one years; and I do hereby expressly charge and make chargeable all my before-mentioned real estates whatsoever, and also the estates so devised to my dear wife for her life as aforesaid, after her decease, but not before, with the payment of all and every the fortunes and sums of money hereinbefore bequeathed and made payable to all and every my younger sons and daughters as aforesaid: and it is my will and meaning, and I do hereby also declare, that my said trustees, or either of them, shall not be liable to answer or make good any losses whatsoever, that shall or may happen to the said rents or interests, or in transacting the trusts of this my will, unless the same shall have arisen through their or
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either of their wilful neglect or default, nor shall either of my said trustees be answerable or accountable for the acts, deeds, disbursements, or receipts of the other of them, but each of them shall be answerable only for his own separate acts, deeds, receipts, or disbursements: and I do order and direct that my said trustees shall and may pay, and reimburse himself and themselves respectively, out of the rents and interests aforesaid, all reasonable and necessary costs, charges, and expenses whatsoever, which they or either of them shall bear, charge, pay, sustain, or be put to, in, or about, or concerning the execution of the trusts hereby in them reposed: and, lastly, I do nominate, constitute, and appoint the said Sir *T. W. White*, and the said *J. M. Richardson*, joint executors of this my last will and testament, on trust and for the purposes aforesaid, and also with my said wife, guardians of all my children during their respective minorities. In witness, whereof," &c.

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The testator afterwards drew his pen through the word "four," where it applied to the gift of 4000*l.* to his younger sons, and, with a pencil, wrote over it "three"; and, in like manner, he drew his pen through the word three, where it applied to the gift of 3000*l.* to each of his daughters, and, with a pencil, wrote over it the word "one." The will was not re-executed or republished after these alterations had been made.

The testator also made a codicil to his will, bearing date the 15th of *August* 1815, which was signed by him, but was not executed or attested in the presence of any witnesses, and was as follows:—

"In my last will and testament, dated the 30th of *September* 1809, I did give and bequeath to all and every my younger sons, who might be living at my decease or afterwards be born alive, the sum of four thousand

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pounds a piece, and to all and every my daughters, who might be living at the time of my decease, or afterwards be born alive, the sum of three thousand pounds a piece: now, I do hereby revoke that part of my said will, and, in lieu thereof, I do give and bequeath to all and every my younger sons, who shall be living at my decease or afterwards born alive, the sum of three thousand pounds a piece; and to each of my daughters, who shall be living at the time of my decease or afterwards born alive, I do give and bequeath the sum of one thousand pounds a piece instead of three thousand pounds. My further will is, that the whole of my estate, situate at *East Markham*, should go to my eldest son, provided the residue of my other estates should be sufficient to pay all my just debts and the above mentioned legacies, when converted into money; but in case my other estates should, when sold, produce more than will pay my debts and legacies, my will is, that all my younger sons and daughters should receive, each of them, a further sum, but not more in the whole than four thousand pounds to each of the sons, nor more than two thousand pounds to each of my daughters."

The testator died in 1826, leaving thirteen children him surviving. At the date of his will, he had three sons and two daughters; he afterwards had four daughters and a son by the same wife *Ann*: and, upon her death, he married a second wife, by whom he had two sons and a daughter.

The bill was filed by the younger children, and prayed a declaration that the younger sons were entitled to legacies of 4000*l.* a piece, and the daughters, to legacies of 3000*l.* each; that these legacies were to be raised out of the real estate; and that the testator was to be considered as having died intestate with respect to his personal estate.

Mr.

Mr. Pepys and Mr. Barber, for the Plaintiffs.

The legacies are charged by the will exclusively on the real estate. The testator, after giving his wife a life interest in some of his lands, devises them, after her decease, to his eldest son *William Kirke* in fee, "chargeable, nevertheless, in aid of the other estates thereafter devised, with the payment of the several sums thereafter bequeathed to his brothers and sisters." He next gives his wife some specific articles; and then devises the rest of his real estate to trustees until his son *William* shall attain the age of twenty-one years, or if he dies without attaining twenty-one, until some one of his sons shall reach that age; and, after that time, they are to go to the son who first attains twenty-one, subject, however, to the payment of all the legacies to the younger sons and daughters, or remaining younger sons and daughters of the testator. Hitherto the lands only have been mentioned or referred to as the fund for the payment of the legacies. The following clause directs the trustees, until a son attains twenty-one, to apply the rents and profits to the maintenance, education, and advancement of the younger children. Next come the express words of gift. The testator bequeaths 4000*l.* to each of his younger sons, and 3000*l.* to each of his daughters, to be paid to them respectively, when they attain twenty-one, by *William*, if he shall attain twenty-one, or by such other son as shall first attain his full age, and by virtue of the will become possessed of the real estates. That son is further ordered to pay interest at 4 per cent. on the legacies of such of the children as should not have attained twenty-one; and the interest is to be paid, for the maintenance and education of the legatees, to those trustees who were also executors, and, as such, would be in possession of the personalty. A clause follows, which expressly charges all the real estates with the sums bequeathed to the younger children. Thus, in every part of the will, these legacies are spoken of as given merely

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out of the real estate; and the question is not, whether the personal assets are exonerated from the payment of them; for they are not given in such a form, as could in any event render them payable out of the personal estate. *Burton v. Knowlton* (a), *Hancox v. Abbey* (b), *Watson v. Brickwood* (c), *Bootle v. Blundell*. (d)

The circumstance that the will does not contain any disposition of the residue of the personal estate affords no argument against the intention of the testator to throw the payment of the legacies on the real estate. *Webb v. Jones*. (e) Neither does the concluding clause, in which the testator appoints the two devisees in trust to be "joint executors of his will in trust and for the purposes aforesaid," furnish a ground for any inference against such an intention. It would be repugnant to the whole frame and language of the will, to construe these words as amounting to a bequest of the general personal estate to them for the purpose of satisfying the legacies. This mode of expression was probably selected, in order to make it evident that the executors were to be trustees of the residue, and were not to take it beneficially; or it may have reference to the duty imposed upon them of paying debts out of the fund which they take as executors, and to the prior bequest of some portion of the personalty to the testator's wife.

The codicil does not make any alteration in the fund out of which the legacies are to be paid. It refers most distinctly to the real estates as being the property which is to bear the burden; and though there are some words, which may have the effect of making the real estate an auxiliary fund for the payment of debts, the creation of a charge on real estate in favour of creditors affords

(a) 3 *Ves.* 107.(d) 1 *Mer.* 193.(b) 11 *Ves.* 179.(e) 2 *Bro. C. C.* 60. 1 *Cox*, 245.(c) 9 *Ves.* 453.

affords no ground for throwing the burden of the legacies on the personal estate.

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The bequest of the legacies is, therefore, *pro tanto* a devise of the land, and consequently cannot be affected by the pencil erasures or interlineations, or by the codicil; for the codicil is not duly attested, and the will was not republished after the alterations in pencil had been made. The gift of 4000*l.* to each of the younger sons, and of 3000*l.* to each of the daughters, is contained in an instrument duly attested; and the writing or document, which is supposed to manifest an intention on the part of the testator to diminish these bequests, cannot be read for the purpose of affecting a charge on real estate. *Sheddon v. Goodrich.* (a) "A legacy charged only upon land," says Lord *Alvanley*, in *The Attorney-General v. Ward* (b), "cannot be altered either as to the quantum or the person by any will but such as would have affected land." It is true that a will of real estate may be revoked by cancellation. But where the purpose of the cancellation, or of the act of which cancellation forms a part, is, not simply to revoke, but to revoke one gift by substituting another in its place, the cancellation does not operate as a revocation, unless the substituted gift be valid. *Onions v. Tyrer.* (c)

Mr. *Roupell*, for the widow of the testator.

Mr. *Bickersteth*, Mr. *Preston*, and Mr. *Turner*, for *William Kirk*, the eldest son.

There is a distinct and independent gift of the legacies; and though there are abundance of expressions in this will, which charge the real estate as an auxiliary fund,
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(a) 8 *Ves.* 481.

(b) 5 *Ves.* 331.

(c) 1 *P. Wms.* 345.

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the personal estate, according to the general rule of law, remains primarily liable. It is not enough to shew that the testator meant to charge the land; the question is, Did he mean to exonerate the personalty? In determining the question of intention, the courts have always considered whether the personal estate had been made the subject of express disposition; and, indeed, it may be doubted whether the personal estate has been held in any case to be exonerated from debts or legacies, except where it was specifically bequeathed. *McClelland v. Shaw* (a), *Greene v. Greene* (b), *Gray v. Minnethorpe*. (c) *Webb v. Jones* is not an exception to this observation; for it appears from the report in *Cox*, that there was in that case a specific disposition of the personalty. This will contains no beneficial bequest of the general personal estate; and the testator, therefore, had no motive to exonerate it from those charges to which it would be naturally liable. He has indeed appointed executors, in whom it vests; but he appointed them executors, "in trust for the purposes aforesaid." What purposes had been mentioned, to which the executors, in performance of this trust, could apply the personal estate, except the payment of the legacies?

If the legacies are to issue only out of the real estate, they are conditional, and dependent upon the contingency of a son of the testator attaining twenty-one. If no son of the testator attained his full age, they would fail. If there had been an ademption of the land either by sale, or by eviction, or in any other way, no part of these legacies could have been demanded, however large the personal estate might be. It is not probable that the testator should have had such an intention.

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(a) 2 *Sch. & Lef.* 558.(b) 4 *Mad.* 148.(c) 3 *Ves.* 103.

The codicil affords strong presumption against the supposed purpose of exonerating the personal estate. The first part of it contains a bequest of sums different in amount from those mentioned in the will, and expressed in such general terms as, standing alone, would be sufficient to make the personalty liable. Then comes the following clause:—“My further will is, that the whole of my estate situate at *East Markham* should go to my eldest son, provided the residue of my other estates should be sufficient to pay all my just debts and the above-mentioned legacies, when converted into money; but in case my other estates should, when sold, produce more than will pay my debts and legacies, my will is, that all my younger sons and daughters should receive, each of them, a further sum, but no more in the whole than 4000*l.* to each of the sons, nor more than 2000*l.* to each of my daughters.” The phrase “my other estates” is here used to denote both real and personal property; and there is clearly a common fund alluded to, out of which both debts and legacies are to be paid. The personalty is unquestionably liable to the payment of the debts. How, then, can it be exonerated from the payment of the legacies? On a question of this kind the Court has a right to look at the state of the testator’s family and the value of his real property; and the result of an inquiry ascertaining the value of his real estates may afford decisive evidence, that he must have contemplated his personalty as a fund which was to be made available for the payment of his legacies.

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If the legacies are charged on both the personal and the real property, they may be modified or altered by an unattested codicil, provided they be not increased. *Brudenell v. Boughton* (a), *Attorney-General v. Ward*. (b)

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(a) 2 *Atk.* 268.

(b) 3 *Ves.* 331.

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There is now no perfect instrument containing the bequests of 4000*l.* and 3000*l.*; for the cancellation of the words, which specify these sums, is complete; and if the Plaintiffs are right in asserting that the Court cannot look at the unattested writing, which marks an intention to give a different sum, the consequence may be, that they will not be entitled to any thing. The pencil erasures and interlineations form part of the will as proved in the ecclesiastical court. The case of *Onions v. Tyrer* is so different in its circumstances from the present, that it would not be safe to deduce from it a principle of decision. Authorities of that class are applicable, only where there is a purpose of substituting one devisee for another.

Mr. *Pepys*, in reply.

The cases and doctrines, which have been referred to in order to shew that the personal estate is not exonerated, are applicable to debts, and not to legacies. The law throws debts upon the personalty; which therefore must always remain liable: and though a testator may make his lands either secondarily or (as between volunteers claiming under him) primarily liable, yet, as between the assets and the creditor, the personalty can never be exempted. Legatees are in a situation altogether different. The testator may give his legacies out of what fund he pleases; and if he gives them in such a manner that they are charged only on his lands, no claim can be set up against his personal assets. In such a case it is improper to say that the personalty is exonerated; the personalty never became liable, and, therefore, does not require to be exonerated.

June 9.

The MASTER of the ROLLS, after stating the will, gave his judgment in the following words: —

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The present bill was filed by the younger sons and daughters, for the purpose of having it declared, that the younger sons were entitled to the sum of 4000*l.* each, and the daughters, to the sum of 3000*l.* each, according to the effect of the will as originally written and executed.

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Three questions were made; first, whether by this will the portions of the younger sons and daughters, originally given, were pecuniary charges upon the personal estate; secondly, whether, by the codicil, the portions there given to the younger sons and daughters would prevail as to the personal estate; thirdly, whether, taking the will and codicil together, the portions to the younger sons and daughters would affect the real estates, and whether to the extent of the original, or of the reduced, sums, or would fail altogether.

A pecuniary legacy given generally, without specification of a particular fund for its payment, is primarily chargeable upon the personal estate, although, in other parts of the will, the real estate is made expressly liable to it; the rule of law considering that the personal estate is the natural fund to bear such a charge. But if the pecuniary legacy be not given generally, but is given only out of a particular fund, there the legatee can have recourse only to the particular fund: and, in this respect, there is an essential difference between debts and legacies.

In the present case, the testator begins his will by a devise of certain lands to his wife for her life, and after her decease, to his eldest son *W. Kirke* in fee, chargeable, nevertheless, in aid of the other estates thereafter devised to him, with the payment of the several sums of money thereafter bequeathed to his brothers and sisters.

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He then makes a specific gift of his household goods and other personal estate in and about his dwelling-house to another person. He next devises all other his real estates whatsoever to trustees, until his eldest or some other son shall attain twenty-one, subject, nevertheless, to payment of the several sums of money thereafter bequeathed to his younger sons and daughters, with a direction that his trustees shall, in the mean time, receive the rents and profits, and shall apply the same, in such proportions as they should think fit, to the maintenance, education, and advancement in the world of all his younger sons and daughters; and then he proceeds to give to his younger sons 4000*l.* each, and to his daughters 3000*l.* each, which, he wills, shall be paid to them at twenty-one by his eldest son, if he shall attain twenty-one, and become possessed of his real estates, or by such other son as shall attain twenty-one and become entitled to his said real estates by virtue of his will; and he thereby expressly charges and makes chargeable all his real estates whatsoever, including those first devised to his wife, after her decease, with the payment of the several sums of money so given to his younger sons and daughters. There is, therefore, no general gift of these sums of money. The direction that they are to be paid by his eldest or other son who shall become possessed of his real estates, is a substantial part of his gift to his younger sons and daughters, and is a designation or specification of the particular fund, which the testator means to provide for that purpose. And that intention, is the more apparent from the prior parts of the will to which I have referred, and more especially, from the direction to the trustees to apply the rents and profits of the real estates, during the minority of the eldest son, in the maintenance, education, and advancement of the younger children. My opinion, therefore, is, that the personal estate of this testator was not by this will,

will, in its original state, applicable to the payment of these legacies or portions.

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The next question is as to the effect of the codicil in this respect.

The testator begins his codicil by referring to the gift of the original sums to his younger sons and daughters, and revokes that part of his will: and, in lieu thereof, he gives to the younger sons 3000*l.* each, and to his daughters 1000*l.* each; and adds, that it is his will that the whole of his estate at *East Markham* should go to his eldest son, provided his other estates, when converted into money, should be sufficient to pay his debts and the above-mentioned legacies, but in case his other estates should produce more than would pay his debts and legacies, then it was his will that his younger sons and daughters should, each of them, receive a further sum, not exceeding 4000*l.* to each of his younger sons, and 2000*l.* to each daughter. It is plain, therefore, that this codicil, though not duly executed, was meant to affect his real estates, and that his intention was to alter the amount of the sums given by the will, but not to alter the fund provided by the will for the payment of them; and, on the contrary, his direction, with respect to the produce of the real estates, other than *East Markham*, manifests that he considered his real estates as the fund out of which these sums of money were to be provided. The mention of his debts in the codicil creates no difficulty. With respect to his debts, the personal estate would by law be the primary fund; and if this codicil had been duly executed and attested, so as to pass real estates, the effect would have been to make the real estates chargeable secondarily with the debts, — which was not provided for by the will. My opinion, therefore, is, that this codicil does not give to the younger sons and daughters

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daughters any claim upon the personal estate for the several sums thereby provided for them.

The remaining and the more difficult question is, whether, taking the will and codicil both into consideration, and having regard to the obliterations made in the will by the testator, the younger sons and daughters are entitled to any and what sums chargeable upon the real estates.

First, it is to be considered what would have been the effect, if there had been no codicil. In that case it must have been inferred, that the testator thought that the obliteration of the words "four" and "three," and the interlineation of the words "three" and "one," would leave the younger sons entitled to 3000*l.* each, and the daughters to 1000*l.*, each. In this he plainly would have been mistaken. The words interlined would have had no operation, inasmuch as the will was not afterwards republished; in which case it would have been manifest that the testator, by the obliterations and interlineations, did not mean revocation but substitution; and then, in addition to the authorities which have been cited, the case of *Short* on the demise of *Gastrell v. Smith* (a), is expressly in point to shew, that, where the testator intends a substitution which is ineffectual, the obliteration shall not amount to a revocation.

Taking, however, the codicil as well as the will into consideration, another view of the case arises. The making of the codicil manifests that the testator did not consider his purpose of diminishing the legacies to be effected by the alterations in his will, but that he meant to accomplish that purpose by the codicil, which he has failed

(a) 4 *East*, 419.

failed to do by reason of the imperfection of that instrument. The alterations in the will, in such case, express only the testator's intention to reduce by another instrument the provisions which he had made for his younger sons and daughters; and, not having made another effectual instrument for that purpose, his original will must prevail. This course of reasoning is supported not only by the case of *Onions v. Tyrer*, which was cited in the argument, but also by the case of *Hyde v. Mason* (a).

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Upon the whole, therefore, I must declare, according to the prayer of the bill, that the younger sons are entitled to the sum of 4000*l.* each, and the daughters, to the sum of 3000*l.* each, chargeable upon the real estates of the testator, with interest thereon, at the rate of 4 per cent. respectively, from the time the eldest son attained twenty-one, and that the testator died intestate as to the residue of his personal estate not disposed of by his will.

(a) 8 *Vin. Abr. Devise*, (R) 2. pl. 17. p. 139.

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BETWEEN

ROLLS.

The Earl of NEWBURGH,

Plaintiff;

May 8. 18. 20.

AND

CAROLINE EYRE and Others,

Defendants.

A testator devises his estates in the county of *Leicester* to trustees, upon trust to sell the same, and also his books and live and dead farming stock there, either together or in parcels, and to apply the money arising therefrom in manner after-mentioned; when he subse-

quently directs the application of the fund, he speaks of it as "the monies to arise from the sale of my *Leicestershire* estate;" these words denote the whole fund, and include the monies arising from the sale of the books and stock, as well as the monies arising from the sale of the estates.

A testator gave one fifth of the yearly interest of a fund to *Mary*, two fifths to *James*, and two fifths to *Charles*; if *Mary* died without issue, the interest of her share was to be paid to *James* and *Charles* during their respective lives, if they were both alive, or, to the survivor, if only one of them were alive; if *Charles* left issue, they were to be entitled to the principal monies, of which the interest had been given to their father; if *Charles* died without issue in the lifetime of *James*, all benefit of the bequest to *Charles* was to go to *James*; if *James*, without having been in possession of the family estate for a certain time, left issue other than an only son, such issue were to be entitled to all the principal monies, the interest whereof *James* might be entitled to as aforesaid; if *James* died without leaving such issue or after having been in possession of the family estate for a certain time, all benefit of the bequest to *James* was to go to *Charles*, if then living; and if both *Charles* and *James* died without leaving any lawful issue to be entitled as aforesaid to the bequest, the fund was to go as the survivor of them should appoint: *Mary* died without issue, in the lifetime of *James* and *Charles*; then *James* died, leaving a daughter, and without having been in possession of the family estate; and afterwards *Charles* died without issue: Held, that the whole fund belonged to the daughter of *James*.


THE will of *Thomas Eyre*, dated the 8th of *October* 1788, after various devises and bequests, proceeded in the following words: — "I give and devise my capital messuage or mansion-house, called *Eastwell*, in the county of *Leicester*, with the lands, hereditaments, and appurtenances thereto belonging, and all other my messuages, lands, and hereditaments in the county of *Leicester*, except the messuage, lands, and hereditaments hereinbefore devised unto the said Sir *John Lawson* and *Thomas Clifford*, their heirs and assigns as aforesaid, unto the said *William Wakeman* and *Vincent Eyre*, their heirs and assigns, upon trust, as soon after my decease as conveniently

niently may be, absolutely to sell and dispose thereof, and also my books and live and dead farming stock there, either together or in parcels, by public or private sale, for the best price that can in reason be got for the same, and to pay and apply the monies to arise from such sale or sales, and the interest thereof, in such manner as is hereinafter mentioned; and, in the meantime, until any such sale or sales shall take place, it is my will, that the yearly rents, issues, and profits of the said estate so directed to be sold, shall be paid and applied to such person or persons, and for such purposes, as the interest of the money to arise from such sale or sales is hereinafter directed to be paid and applied; and, as to the monies to arise from the sale of my *Leicestershire* estate hereinbefore devised to be sold, it is my will and desire, that the said monies, as far as may be necessary, shall be applied towards the payment of such of my debts and legacies as my personal estate, not hereby specifically otherwise disposed of, and the monies to arise from the other sales of both real and personal property hereby directed to be made, may be deficient to pay and satisfy; it being my intention and wish, that the monies to arise from the sale of my *Leicestershire* estates should not be applied for the payment of any of my debts or legacies, until the other funds appropriated for that purpose shall be wholly exhausted; and, subject to this provision for the payment of my debts and legacies, I desire that the said *William Wakeman* and *Vincent Eyre*, or the survivor of them, his executors, administrators, and assigns will place the said monies to arise from the sale of my *Leicestershire* estate out at interest, upon such public or private security, and do and shall from time to time alter and change such security in such manner as they may think fit, and do and shall pay and apply the yearly interest thereof in

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satisfaction and discharge of" three small annuities: "and subject as aforesaid," continued the testator, "it is my will, that my said trustees do and shall pay the remainder of the interest of the said monies to arise from the sale of my said *Leicestershire* estate unto my dear wife Lady *Mary Eyre* for her life, for her own use and benefit; and from and after the decease of the said Lady *Mary Eyre*, and subject to the annuities aforesaid, I desire the said *William Wakeman* and *Vincent Eyre*, or the survivor of them, his executors, administrators, or assigns, do and shall divide the yearly interest of the said monies so directed to be placed out at interest as aforesaid into five equal parts or shares, and pay the same unto my cousins *James Eyre* and *Charles Eyre*, two younger sons of my uncle *Francis Eyre*, and unto my cousin *Mary*, his daughter, in manner following, (that is to say), — two fifth parts thereof, unto my cousin *James Eyre* for his life — two other fifth parts thereof, unto my cousin *Charles Eyre* for his life — and the remaining one fifth part, unto my cousin the said *Mary Eyre*, for her life; and if the said *Mary Eyre*, my cousin, shall have any lawful issue living at her decease, I give unto such issue one equal fifth part of the principal monies, the interest whereof is given to her for her life as aforesaid, — if more than one, to be equally divided between or among them; but if my cousin, the said *Mary Eyre*, shall die without such issue as aforesaid, it is my intention that the interest of the said monies, so given to her for life as aforesaid, shall go to and be equally divided between her said two brothers, *James* and *Charles Eyre*, if they shall be both living at her decease, for their respective lives, or if only one, to the survivor for his life: and if my cousin, the said *Charles Eyre*, shall leave any lawful issue living at his decease, it is also my intention that such issue shall be entitled to

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the principal monies, the interest whereof is to be given to the said *Charles Eyre* for his life as aforesaid,—if more than one, equally, share and share alike; but if the said *Charles Eyre* shall die without such issue as aforesaid, living the said *James Eyre*, his elder brother, I give unto the said *James Eyre* all benefit and advantage of the bequest hereby made unto his brother the said *Charles Eyre*, and if the said *James Eyre* shall, without having succeeded to and been in the actual possession of my family estate at *Hassop* for the space of five years next before his decease, leave any lawful issue other than an eldest or only son living at his decease, it is my will that such issue, other than an eldest or only son, shall be entitled to all the principal monies, the interest whereof the said *James* may be entitled to as aforesaid,—if more than one equally, share and share alike; but if the said *James Eyre* shall depart this life without leaving any such issue as aforesaid, living his brother the said *Charles Eyre*, or having no lawful issue other than an eldest or only son, shall come into possession of the *Hassop* estate, or, having such lawful issue, shall have held and enjoyed the same for the space of five years, then and in any of the said cases, and from the happening thereof, if the said *Charles Eyre* shall be then living, it is my intention that all benefit and advantage of the bequest hereby made in favour of the said *James Eyre* shall go over and belong to his brother *Charles Eyre*; and if it shall happen that both the said *James* and *Charles Eyre* shall die without leaving any lawful issue to be entitled as aforesaid to the bequest in question, it is my will, that the whole of the property hereby bequeathed to them as aforesaid shall go to and be disposed of by the survivor of them, to and in such manner as such survivor shall think fit; and if any thing shall remain of my personal estate appropriated

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for payment of my debts and legacies, or of the monies to arise by sale of my house in *Stanhope Street*, or of my said estate in possession of the said widow *Biddulph*, after payment of my debts and legacies, I give and bequeath such residue and remainder unto the said *William Wakeman* and *Vincent Eyre*, their executors or administrators, upon trust to be added to the monies to arise by sale of my said *Leicestershire* estate, and to be disposed of by them, both principal and interest monies, in such manner as I have hereinbefore directed concerning the said last-mentioned monies."

Thomas Eyre died in 1792, leaving *Francis Eyre* his heir at law and sole next of kin. *Lady Mary Eyre* died in *January* 1804, and, during her life, *Mary Eyre* died without issue. *James Eyre* died in *October* 1816, leaving one daughter, *Caroline Eyre*, his only child; and *Charles Eyre* died without issue in *June* 1819. Neither *James* nor *Charles* had succeeded to, or been in possession of, the family estate at *Hassop*.

The Earl of *Newburgh*, as heir at law, and one of the next of kin of *Francis Eyre*, who was the heir at law and sole next of kin of the testator *Thomas Eyre*, filed the bill, insisting that, in the events which had happened, a moiety of the proceeds of the property, directed to be sold, was not disposed of, and had, therefore, devolved, either in whole, or in part, upon *Francis Eyre*, and now belonged, either in whole or in part, to those who claimed through him.

One question was, whether the expressions — "said monies to arise from the sale of my said *Leicestershire* estate" — were to be construed, so as to extend to the whole of the mixed fund, consisting partly of the proceeds

ceeds of the books and farming stock, of which the testator had previously spoken. But on this point there was little argument.

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The principal question was, Who, in the events which had happened, — *James* having died, without having been in possession of the *Hassop* estate, and having left a daughter, and *Charles* having afterwards died without issue, — was entitled to that moiety of the fund, of which *Charles* had enjoyed the interest during his life.

Mr. Sugden, Mr. Barber, and Mr. Koe, for the Plaintiff.

The testator has specified a variety of contingencies, on each of which he has made a particular disposition of the fund; but he has overlooked the contingency which has actually happened. Having divided the fund into five shares, he gives the interest of two of those shares to *James* for life, and of other two of them to *Charles* for life; the remaining share is given to *Mary* for her life, and afterwards to her children; but if she should die without issue, leaving both her brothers alive (which was the event that happened), that share is given to them as tenants in common for their respective lives. The effect, therefore, of these bequests, with reference to the actual circumstances, was, to give each of the brothers a life interest in the moiety of the fund.

The testator next disposes of *Charles's* moiety, in case he left issue; and as he gives, in that event, to the issue of *Charles* "the principal monies, the interest whereof is so given to the said *Charles Eyre* for his life as aforesaid," it is clear that, under these words, the children or descendants of *Charles* could never have claimed more than their father's moiety; and such only of his issue could have claimed, as were living at his decease. The

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following words provide for another event, — “but if the said *Charles Eyre* shall die without such issue as aforesaid, living the said *James Eyre*, his elder brother, I give unto the said *James Eyre*, all benefit and advantage of the bequest hereby made unto his brother, the said *Charles Eyre*; and if the said *James Eyre* shall, without having succeeded to and been in the actual possession of my family estate of *Hassop* for the space of five years next before his decease, leave any lawful issue, other than an eldest or only son, it is my will that such issue, other than an eldest or only son, shall be entitled to all the principal monies, the interest whereof the said *James* may be entitled to as aforesaid.” The gift is confined to the event of *James* surviving *Charles*, and it is a gift only of that “to which *James* might be entitled as aforesaid” under the preceding bequests; *James* never could become entitled to *Charles*’s moiety, unless he survived him; that event did not happen; and the daughter of *James*, therefore, cannot claim under these words.

The subsequent part of the will is in accordance with this construction. The event next contemplated is the death of *James* under such circumstances, that there would then be no issue entitled to his share under the previous words; and the disposition, which, in that case, is made of his moiety, is to have effect, only if *Charles* shall be then living.

The ultimate gift over to the survivor of the two brothers does not affect the question; for that gift is to come into operation only “if both *James* and *Charles* shall die without leaving any lawful issue to be entitled as aforesaid;” and as *James Eyre* left a daughter, *Caroline*, who is clearly entitled to his moiety, the event, for which provision is here made, did not occur.

Upon

Upon the whole, therefore, the testator has not provided for the event of *James* dying in the lifetime of *Charles*, and leaving issue entitled to his own moiety; and, therefore, the principal of that share of the fund, the interest of which was payable to *Charles* during his life, is not disposed of.

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We admit that it probably was not the intention of *Thomas Eyre* to die intestate with respect to this portion of his property; and if it had been suggested to him that *James* might die in the lifetime of *Charles*, leaving other issue than an eldest son, and without having been in possession of the family estate, he would, in all likelihood, have made a less defective testamentary disposition. But a court of justice cannot conjecture in what way the defect would have been cured. If *Charles* had died in the lifetime of *James* leaving issue, and *James* had afterwards died without issue, there would have been no testamentary disposition of *James's* moiety; and, perhaps, it may be conjectured not unreasonably, that, had the question been put to the testator, "to whom, under these circumstances, do you wish *James's* share to go" — he would have answered, "to the children of *Charles*." But no court of justice has ever gone so far in imputing to a testator an intention not expressed in the will; and yet to adopt that conjecture as the rule of construction would not be a greater departure from the words of the instrument, than it will be to hold, that, in the events which have happened, the share of *Charles* is to go to the daughter of *James*.

In many respects this will is probably very different from what the testator would have made, if he had been aware of its true effect. For instance, the bequests are only to such issue of *James* as should be living at his death, and to such issue of *Charles* as should be living

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at his death. *James* and *Charles* might have had many younger sons and daughters, who married and settled in life, and afterwards died in the life-time of their father; and none of those, who so died, would have taken vested and transmissible interest in any portion of the fund. *Thomas Eyre*, if this had been explained to him, would unquestionably have said that his intention was very different. But what Judge would presume, on such a foundation, to hold, that any interest vested in a child of *Charles* or *James* during the father's life? The construction, which would give the share of *Charles* to the daughter of *James*, rests on equally conjectural ground.

There are abundance of authorities to shew, that, even in cases of great hardship, courts cannot supply such words as must be supplied here, before the will can be construed to amount, in the events which have happened, to a disposition of the beneficial interest in *Charles's* moiety. *Davis v. Norton* (a), *Doe v. Shippard* (b), *Doo v. Brabant* (c), *Humberstone v. Stanton* (d), *Avelyn v. Ward*. (e)

The executors of the testator are mere trustees of the personal estate, and can claim no beneficial interest in any part of the fund; and, therefore, the moiety of *Charles* devolved upon *Francis Eyre*, subject to any claim which the widow of the testator might have upon so much of it as should be considered to be clothed with the character of personal estate.

Mr. Horne and *Mr. Tinney* for the executor of *Francis Eyre*, did not claim any interest.

Mr.

(a) 2 P. Wms. 390.

(d) 1 Ves. & B. 384.

(b) Dougl. 75.

(e) 1 Ves. sen. 480.

(c) 5 Bro. C. C. 393. 4 T.

R. 704.

Mr. *Bickersteth*, for the widow of *Francis Eyre*.

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Mr. *Merivale* and Mr. *Stephenson*, for the widow of *James Eyre*.

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Mr. *Swanston*, for the executors of *Charles*.

We agree with the Plaintiff in denying, that the will contains any gift, under which the daughter of *James* can take this moiety of the fund; but we say that it vested absolutely in *Charles* himself. The last limitation provides for an event which is expressed in the words, "If it shall happen that both the said *James* and *Charles Eyre* shall die without leaving any lawful issue to be entitled as aforesaid to the bequest in question." That event has occurred; for there is no issue of either of them entitled under the will to the whole of the bequest. In this state of circumstances the direction of the testator is, "that the whole of the property, hereby bequeathed to them as aforesaid, shall go to and be disposed of by the survivor of them to and in such manner as such survivor shall think fit." These words may be read distributively, *Gilbert v. Witty* (a): the construction will then be, that, if neither of the two brothers leave issue entitled to the fund, the survivor shall take absolutely the whole or a moiety of it, as the event may be; and, there being no issue, who can claim the share given to *Charles* for his life, and he having survived his brother, that share, upon his death, vested in his personal representatives. By this construction the will is made to provide for every event.

Mr. *Parry*, on the same side.

The plan of the testator was, that *James* and *Charles* should take their respective shares absolutely, except only

(a) *Cro. Jac.* 655.

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only in one or other of two contingencies — namely, their respective deaths, leaving issue, or the death of one of them without issue in the lifetime of the other of them. After the clauses, which, in the events that have happened, gave *Charles Eyre* a life interest in the moiety of the fund, his share is expressly limited to his issue living at his decease; and if he dies without issue in the lifetime of *James*, the latter is to have all benefit and advantage of the bequest to *Charles*; in other words, *James* is to take *Charles's* moiety absolutely. The extent of interest, which *James* takes under these words, must not be measured by the interest previously given to *Charles*. The moiety was given to *Charles* for his own life; but it would have been absurd to have limited the fund to *James* during the life of a man, upon whose death only it was that the limitation could come into operation; and it would be a wild construction which would hold, that, as *Charles* was to enjoy the moiety only for his life, so *James* was, in the specified event, to take an analogous extent of interest — namely, the dividends of the fund during his own life. It is clear that there are no words which, in any event, could have carried over the share of *James* to the children of *Charles*; and a construction, which excludes the children of *James* from taking the share of *Charles*, seems to be in accordance with the general tenor of the will. In like manner the testator, in disposing of *James's* share after his death, provides, first, for the event of his leaving issue, and secondly, for the event of his dying without issue in the lifetime of *Charles*; and he directs, that, on the latter contingency, the benefit of the bequest shall belong to *Charles*. Thus the testator has made a complete disposition of the share of whichever of the two brothers should die first; it was to go to his issue, if he left any, and if not, to the survivor. He has also made a contingent disposition of the share
of

of the survivor; for, in the event of the survivor leaving issue, they were to take it. The only contingency, which remained to be provided for, was, to dispose of the share of the survivor, if he should die without leaving issue; and this the testator has done in the last clause. When he there directs that the "whole of the property bequeathed to them as aforesaid" should go to the survivor, he must not be considered as disposing of that portion of the whole, which, in the anticipated state of circumstances, he had previously given to the survivor, namely, the share of the one who died first; he must be regarded as dealing only with that portion of the fund, to which, if the survivor of the two brothers died without issue, no course of devolution had been prescribed; and the effect of the words is, to give to such survivor absolutely that share in which, under the preceding limitation, he had only a life-interest. The testator did not intend to say, that the surviving brother should not become entitled to his own share absolutely, unless the deceased brother's share was previously in him. The words must be interpreted *reddendo singula singulis*. *Davenport v. Oldis* (a), *Watson v. Foxon* (b), *Johnson v. Smart* (c), *Aylor v. Chep* (d), *Wyndham's case*. (e)

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If *Charles's* representatives are not entitled to his moiety of the fund, the Court must hold, that, in the events which have happened, there is an intestacy as to that share. *Dern v. Bagshaw* (g), *Holmes v. Cradock* (h), *Parsons v. Parsons*. (i)

Mr.

- (a) 1 Atk. 579.
- (b) 2 East, 56.
- (c) 2 Roll. Abr. 416.
- (d) Cited in 1 Saund. 184.

- (e) 5 Rep. 78 b.
- (g) 6 T. R. 512.
- (h) 3 Ves. 390.
- (i) 5 Ves. 578.

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Mr. Pepys, Mr. Preston, Mr. Hodgson, and Mr. Pemberton, for Caroline Eyre.

In the events which have happened, the testator has expressly given to the issue of *James* "all the monies, the interest of which *James* may be entitled to as aforesaid." Among the monies, to which he might be entitled under the prior bequests, was the share of *Charles*; and, though *James* was not to take that share for his life, unless he survived *Charles*, the same contingency does not extend to the gift to his children. It was immaterial to the intention which the testator had in favour of the children, whether the parent was alive at the time when *Charles* died without issue: the survivorship of the parent was of importance, only with a view to the enjoyment of the limited interest which was destined for him. If the express words of gift to the issue of *James* are considered as at all limited by the contingency previously mentioned of "*Charles* dying without such issue as aforesaid, living *James Eyre*," the right of *Caroline Eyre* to her father's moiety of the fund might be questioned with as much reason as her right to her uncle's share. There could be no intention of excluding the child, merely because the father died before the time when he might have come into possession.

Even if there were not an express gift to the issue of *James* other than an eldest son, the ultimate bequest would afford a sufficient ground for giving the fund to such issue by implication. The object of that clause is to dispose of the whole fund in one mass; it disposes of it only in the event of both brothers dying "without leaving issue to be entitled as aforesaid;" and, therefore, to give effect to the intention of the testator, a bequest to the issue of *James* and *Charles* might be implied.

In

In support of the argument for the claim of *Caroline Eyre*, the following authorities were cited:—*Horton v. Whittaker* (a), *Harman v. Dickenson* (b), *Napper v. Sanders* (c), *Lethicullier v. Tracy* (d), *Goodright v. Hoskins* (e), *Doe v. Frost* (g), *Mackell v. Winter* (h), *Pearsall v. Simpson* (i), *Murray v. Jones* (k), *Massey v. Hudson*. (l)

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The MASTER of the ROLLS.

May 20.

The testator, in that part of his will, upon which the question in this cause arises, devises his mansion-house called *Eastwell* in the county of *Leicester*, together with all other his estates in the county of *Leicester* to certain trustees, upon trust to sell the same, and also all his books and live and dead farming stock there, either together or in parcels, and to apply the money arising therefrom in manner after-mentioned. When he subsequently speaks of the application of these monies, he uses the expression, “the monies arising from the sale of my *Leicestershire* estates:” and a question has been made, whether in this description he means to include the monies arising from the sale of the books and farming stock. The mansion-house, lands, books, and farming stock were to be sold together or in parcels, at the option of the trustees, and the monies arising therefrom were to form a common fund; and it is plain that he meant to describe that common fund by the description of “the monies arising from the sale of his *Leicestershire* estates.”

These monies, subject to the payment of debts and legacies, in aid of other property directed to be first applied

(a) 1 *T. R.* 346.

(g) 1 *B. & C.* 638.

(b) 1 *Bro. C. C.* 91.

(h) 5 *Ves.* 256. 536.

(c) *Hutton*, 119.

(i) 15 *Ves.* 29.

(d) 3 *Atk.* 784.

(k) 2 *V. & B.* 513.

(e) 9 *East*, 506.

(l) 2 *Mer.* 150.

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applied for those purposes, are given to his wife lady *Mary Eyre* for her life, and after her death, to his three cousins *Charles*, *James*, and *Mary Eyre*, for their respective lives in the following proportions, viz. one fifth, to *Mary Eyre*, and two fifths each, to *Charles* and *James*. If *Mary Eyre* should die without leaving issue, which event did happen, her fifth is to be divided between *Charles* and *James* for their lives: and it is admitted that the two fifths, which were given to *James*, and the half of one fifth, which he took for life upon the death of *Mary*, now belong to his only child, the defendant, *Caroline Eyre*.


James, having survived *Mary*, died in the lifetime of *Charles*; and *Charles* afterwards died without leaving issue: and the first question in the cause, is, whether, in these events, *Charles's* original two fifths, and the half of *Mary's* one fifth, making a moiety of the whole fund, belong to the daughter of *James*, or are undisposed of by the will.

After directing that *Mary's* one fifth shall be equally divided between *James* and *Charles* for their respective lives, if they shall be living at her decease, or if only one of them shall be living, then to the survivor for his life, the testator proceeds thus, "And if my cousin, the said *Charles Eyre*, shall leave any lawful issue living at his decease, it is also my intention that such issue shall be entitled to the principal monies, the interest whereof is to be given to the said *Charles Eyre* for his life, share and share alike; but if the said *Charles Eyre* shall die* with-
 out

* The words of the will, as stated in the briefs, to which the reporter has had an opportunity of referring, are, "If the said

James Eyre shall, without having succeeded, &c., leave any lawful issue, &c."

out leaving such issue as aforesaid, living the said *James Eyre*, I give to the said *James Eyre* all benefit and advantage of the bequest hereby made to his brother, the said *Charles Eyre*; and if the said *James Eyre* shall die without having succeeded to and been in the actual possession of my family estate at *Hassop*, for the space of five years next before his death, and shall leave any lawful issue, other than an eldest or only son living at his decease, it is my will that such issue, other than an eldest or only son, shall be entitled to all the principal monies, the interest whereof the said *James* may be entitled to as aforesaid, if more than one, equally, share and share alike." Then follows a gift over to *Charles* of all the benefits intended for *James*, in case *James* should die in the life time of *Charles*, either leaving no issue, or no issue other than an eldest or only son, or having been in possession of the *Hassop* estate for five years: and this is immediately succeeded by the ultimate disposition, to which I shall presently more particularly refer.

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The question then is, What, in the events which have happened, did the testator intend should go to an only daughter of *James*? Having given the share of *Mary*, dying without leaving issue, between *James* and *Charles* for life, if they were both then living, or to the survivor, if only one were living, he goes on to say, that, if *Charles* should die without leaving issue, living *James*, then *James* should take all benefit intended for *Charles*; that is, *James* should take the original share of *Charles*, and the derivative share which *Charles* would take from *Mary*, upon her death without leaving issue; and it is plain from the whole context of the will, that *James* was to take this for life only. The next gift is to the issue of *James*, other than an eldest or only son, in case *James* was not five years in possession of the *Hassop* estate; and it is a gift "of all the principal monies, the interest

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terest whereof *James* may be entitled to as aforesaid." What were the principal monies, to which *James* might be entitled in the events aforesaid? First, he was certainly entitled to his original two fifths; then, to the half or whole (as the case might be) of *Mary's* fifth, if she died without leaving issue; and next to the interest of *Charles's* two fifths, if he died without leaving issue, and *James* should survive him. In other words, *James* might, in certain events, be entitled to the interest of the whole property. Now *James* was not in possession of the *Hassop* estate for five years, and he has left other issue than an eldest or only son; and such issue are to take, not *what he was entitled to* under the will, but *what he might become entitled to* under the will, which, in the events that have happened, is the whole property.

This, which appears to me to be the plain effect of the language used, is consistent with the general intention of the testator, to be inferred from his ultimate disposition which is in these words: "If it shall happen, that both the said *James* and *Charles Eyre* shall die without leaving any lawful issue to be entitled as aforesaid to the bequest in question, it is my will that the whole of the property, hereby bequeathed to them as aforesaid, shall go to and be disposed of by the survivor of them in such manner as he shall think fit." If, in this ultimate limitation, the words "entitled as aforesaid" were not found, and it had been expressed simply, "in case *James* and *Charles* should both die without leaving issue," then it must have been admitted that the general intent of the testator was, that the property in question should be at the disposition of the survivor, only in case neither *James* nor *Charles* left issue. It does not appear to me that the introduction of the words "entitled as aforesaid" makes any material difference. These words are to be applied to the events, on which
 the

the title of *James's* issue were to depend. The issue of *James* were not to take, in case *James* had been in possession of the *Hassop* estate for five years, or in case he had no other child than an only son; and this ultimate limitation is to be read as if it were thus expressed — “In case *Charles* shall die without leaving any lawful issue, and in case *James* shall die without leaving any lawful issue other than an eldest or only son, or having been in possession of the *Hassop* estate for five years, the property is to be at the disposition of the survivor.” The plain inference, therefore, is that the testator considered that the prior gifts would exhaust the whole property, unless *Charles* should die without leaving issue, and unless *James* should die without leaving other issue than an eldest or only son, or should be in possession of the *Hassop* estate for five years.

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 NEWBURNH
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 EYRE.

The argument opposed to this construction is, that the gift to *James's* issue after his death is to depend, like the gift over of *Charles's* share to *James* himself, upon the event of *James* surviving *Charles*. The gift over to *James* himself of *Charles's* share, being for the life of *James* only, necessarily depended upon his surviving *Charles*; but what reason can be given, why the testator should intend that *James's* children should be wholly unprovided for, unless *James* should happen to survive *Charles*? Such is not the necessary effect of the language used by the testator, and it is plainly against the general intention, and is wholly irrational.

But that is not all. There is in this will no other gift to *James's* children, than that which I have read, and upon which the question in the cause depends. If the condition of *James* surviving *Charles* be a condition precedent to this gift, I am perfectly at a loss to know what title the daughter of *James* could have to *James's* original two

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fifths of the property, and to the half of *Mary's* one fifth; yet this bill is framed upon an admission of the daughter's title to that extent.

It must be admitted, that, in some events which might have happened, the testator has not accurately expressed what must be presumed to have been his intention: but with respect to the gift to *James's* issue, in the events which have happened, I am of opinion, that the expressions used fully work out his general intention.

I therefore declare, that the defendant *Caroline Eyre*, is entitled to the whole of the residuary property arising from the sale of the *Leicestershire* estates, including therein the produce of the books and farming stock: and this declaration makes it unnecessary to consider the other questions which have been argued in this cause, the effect of which was only to determine who would have been entitled, in case the defendant *Caroline Eyre* was not entitled.

1828.

ANONYMOUS.

ROLLS
May 21.

ON a petition to confirm the Master's report, approving of a settlement on a female ward, who had married without the sanction of the Court, Mr. *Lovat* asked, that the costs of the husband might be paid out of the fund, as well as those of the other parties. The husband had no property, but there were not any circumstances of aggravated misconduct on his part; and it was stated, that he had married the lady, without being aware that she was a ward of the Court.

The husband's costs of the proceedings in making a settlement of the fortune of a ward, whom he had married without the leave of the Court, were allowed to him out of the fund, he having no property of his own, and there being no circumstances of aggravation in his conduct.

Mr. *Whitmarsh*, for the trustees, *contra*.

The MASTER of the ROLLS was at first not inclined to allow the husband his costs; but, a case having been mentioned in which Lord *Eldon* had made a similar order, he at length directed that the husband's costs should be paid out of the fund.

1828.

Jan. 25.

HARRIS v. KEMBLE.

Where the decree, among other things, refers it to the Master to appoint a new trustee, the certificate of the appointment of such new trustee is to be considered as a separate report.

BY the decree of the Vice-Chancellor, made at the hearing of the cause, an agreement for a lease of *Covent Garden Theatre* was ordered to be specifically performed; and it was referred to the Master to settle and approve of a lease or leases, which were to be executed by all necessary parties, and to appoint a new trustee in the place of *Harrison*, who had been named trustee in the agreement. Some inquiries were also directed; but there was no clause giving the Master liberty to make a separate report.

Mr. Rowland Stephenson was proposed by the Plaintiff as trustee. The Defendants objected to him; but the Master disallowed the objections, and, on the 21st of *August 1827*, signed a certificate or report, stating, that he had approved of *Rowland Stephenson* to be trustee in the room of *Harrison*.

The Defendants moved that this report might be taken off the file. The ground on which it was attacked was, that it was in fact a separate report, which a Master could not make, unless an express power to that effect were given to him, and that the decree in this cause did not authorize the Master to make separate reports.

It was stated, that, in the offices of seven of the Masters, it was the practice to make and file such reports or certificates, without any special direction from the Court; that, in the other three offices, the practice was the other way; that three of the registrars were of opinion that it was irregular to make and file such reports, unless the decree authorized the Master to make a separate report;
and

and that the fourth registrar had not given any opinion on the point.

The Vice-Chancellor ordered the certificate to be taken off the file.

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KEMBLE.

1827.

Dec. 18.

The Plaintiff now moved before the Lord Chancellor, to discharge the order of the Vice-Chancellor, and that the Master might be at liberty to make separate reports of any of the matters referred to him by the decree.

Mr. Sugden and *Mr. James*, in support of the motion.

Where it is referred to a Master to approve of a proper person to fill some office or undertake some duty, as, for instance, to be guardian of an infant, the judgment of the Master is not operative by itself: he must make his report, and the report must be confirmed by the Court. But where the reference to him is to settle deeds or to appoint a trustee, a receiver, &c., his judgment does not require confirmation by the Court: he certifies that he has settled the deeds or made the appointments; to such a certificate exceptions cannot be taken; and the parties can quarrel with it only by presenting a petition. Granting a certificate of the appointment of a new trustee is not making a separate report: it is merely a formal mode of announcing to the parties what the Master has done, and of giving them an opportunity, if the Master has done wrong, to apply by petition that his order may be corrected. A Master cannot make a separate report, without liberty expressly given him by the Court, because the expense of the suit is thereby increased; and the directions, relative to the matters contained in that separate report, would have to be obtained upon petition, though otherwise they would have formed part of the decree on further directions. But when the decree in this cause is executed, the suit is at

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HARRIS

v.

KENNELL.

an end; no further directions are reserved or can be given; and the certificate is merely the formal completion of one part of the decree.

It is absolutely necessary that a trustee should be appointed, before the rest of the decree can be prosecuted. Two leases are to be settled by the Master, which all necessary parties are to execute; and in one of these leases the new trustee must be lessee; in the other, he must be lessor. As soon as the leases are settled, the Plaintiff, by taking out the proper warrants, may compel the Defendants to execute them, though the Master should not have made his general report. But it will be nugatory to have the leases executed, till the Master has by his certificate or report formally intimated his appointment of a new trustee; for till such formal intimation of the appointment is given, it is not requisite for a dissatisfied party to petition the Court to reject the selection made by the Master. If, therefore, the appointment of a new trustee is not to be the subject of a separate certificate, but must be introduced into the general report, the effectual prosecution of the decree may be delayed indefinitely.

The utmost that can be said by the Defendants is, that the certificate is nugatory. But it does no injury to any person: why, then, should it be taken off the file? In *Fox v. Mackreth* (a), the Master granted a document, which was called a certificate, but was, in truth, a statement of what he considered to be the result of certain accounts which he had been directed to take, and which would necessarily form part of his general report. The granting of such a certificate was altogether irregular; yet the Lord Chancellor refused to order it to be taken off the file.

Mr.

(a) 1 Ves. jun. 69.

Mr. Twiss and Mr. L. Lowndes, *contra*.

1828.

HARRIS
v.
KEMBLE.

What has been called a certificate is, in form and substance, a report. In *Fox v. Mackreth* (a), the Lord Chancellor said, "I never heard of such a thing as a certificate by a Master, though the Accountant-General gives one. I must have the report, in order to take notice of any thing in the Master's office."

The LORD CHANCELLOR.

According to the general rule*, the Master has no power to make a separate report of any matters referred to him by the decree, unless liberty be given to him by the order of the Court. I am of opinion, that the document which has been called a certificate is to be considered as a separate report; and the consequence is, it cannot be sustained, since the decree did not authorize the Master to make separate reports.

Feb. 11.

If, by the practice of the offices, the certificate of the appointment of a trustee had been considered as an exception from the rule, I should have felt myself bound by that practice. But though in a majority of the Masters' offices the opinion is entertained, that a certificate, like that which is now in question, is not a separate report, yet there are some of the offices in which a contrary way of thinking prevails; and the registrars consider such a certificate to be a separate report. Under these circumstances, the general principle must be followed.

Leave was given to the Master to make separate reports as to any of the matters referred to him.

(a) 1 Ves. jun. 70.

* This was before the new orders. See order 70.

1828.

Jan. 25, 26.

MESSENGER v. ANDREWS.

A testator gives a specific bequest to *A.*, and directs, that, in consideration of the bequest, *A.* shall pay his debts, and makes *A.* his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if *A.* accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.

THE testator, by his will, gave his son *Richard Messenger* a legacy of 100*l.*, and devised to him a real estate at *Croydon*: to his daughter he gave a freehold-house, all the furniture, plate, linen, &c., in a public-house, called *The Gun*, which he occupied, and a legacy of 700*l.* with interest, from the day of his death; and he gave to his son *James Messenger*, a farm at *Woodside*, with the stock and utensils upon it, subject to certain contingent interests in remainder, limited to the wife and children of *James*. The will then proceeded in the following words:—"I also will and bequeath unto my son *James Messenger*, my lease and good will of the public-house called *The Gun*, in *Church Street, Croydon*, with all the stock of beer, and wine and spirituous liquors on the said premises at the time of my decease, and my will is, that, in consideration of the above bequest to my son *James Messenger*, he shall pay to my daughter *Marian*, her legacy or sum of 700*l.*, and all my debts which I may owe at the time of my decease, and that he also pay unto my son *Richard Messenger*, the legacy I have bequeathed to him of 100*l.*, and, after collecting all my debts which are due to me of every kind whatsoever, and paying the legacies above-named, and the sum of 60*l.* to *William Waters*, in such proportions as he shall think fit, at, or before he arrives at twenty-one years of age, I constitute and appoint him my son, *James Messenger*, residuary legatee of all my personal property whatsoever, and I do hereby also appoint him, my said son *James Messenger*, my whole and sole executor."

The

The testator died in *December* 1818 : he was a trader at the time of his death.

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James Messenger proved the will ; collected the testator's personal estate ; entered into possession of *The Gun* public-house, and the stock of wine, beer, and spirituous liquors ; and carried on the business in it. Some time afterwards he surrendered the existing lease, of which about ten years were unexpired, and obtained a new lease, under which he still occupied the premises and carried on the trade.

In 1823, *James Messenger* filed a bill, alleging that the debts of the testator considerably exceeded the value of all the personal assets ; that he had applied in payment of the debts, not only all the personal estate of which he had possessed himself, but monies of his own, far exceeding the value of the lease and good-will of *The Gun* public-house, and what he was bound to contribute in respect of the freehold estate devised to him ; and that he had entered upon and retained the public-house, not by virtue of the bequest, but in part satisfaction of the monies so advanced by him. The prayer was, that the sum, by which the personal estate was insufficient for the payment of the testator's debts, might be raised rateably out of the different freeholds devised by his will.

The defendants, by their answers, insisted, that the bequest of *The Gun* public-house and the stock in it, was subject to the condition that *James Messenger* was to satisfy the debts and legacies ; that he had accepted the bequest : and that he had thereby taken upon himself the payment of the testator's debts and legacies.

On the 30th of *June* 1825, the cause was heard before the Vice Chancellor ; when His Honor declared, that the
Plaintiff,

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MESSINGER
v.
ANDREWS.

Plaintiff, accepting the bequest of the lease and goodwill the public-house called *The Gun*, in *Church Street, Croydon*, with the stock of beer, wines, and spirituous liquors, on the premises at the time of the testator's death, was bound to pay the debts which the testator owed at his death; and it was ordered that it should be referred to the Master in rotation, to inquire and state to the Court, whether the Plaintiff did accept the bequest; and the Master was to be at liberty to state special circumstances.

The Plaintiff appealed.

The principal question was, whether the words of the will merely created a trust, charging the debts of the testator on the specific bequest to *James Messenger*, and making it incumbent on him to satisfy the debts, so far as the specific bequest would extend; or, whether they imposed a condition which rendered it obligatory on the legatee, if he accepted the bequest, to satisfy the debts, however much they might exceed in value the worth of the subject of the gift.

The Attorney-General (Sir Charles Wetherell) and Mr. *Jacob*, for the Appellant.

When the testator gives the public house and his stock in trade to his son *James*, and directs, that, in consideration of the bequest, he is to pay the testator's debts, his meaning must have been to confer a benefit, and not merely to impose a burthen upon the legatee. But, if the legatee is to be answerable for the debts, beyond the amount of the value of the gift, ruin may be entailed upon him under the semblance of bounty. It is unreasonable to impute to the testator an intention that *James* should pay the debts with his own money; the sole purpose was, to make the debts a primary charge on the personal property specifically bequeathed to him.

In

In fact, the debts of the testator amounted to about 2,500*l.*, and the whole of the personal property did not exceed 500*l.* in value; it is absurd to suppose that any man would, in consideration of a part of 500*l.*, make himself liable for 2,500*l.*, or that any father would wish to place a son in such a situation.

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Even if the words be supposed to create a condition, the condition is senseless and void, or, at least, inoperative: for he, on whom the condition is imposed, is the person who is to have the benefit of the breach of it. *Smith v. Alterley.* (a) In an *Anonymous* case (b), land was devised to the heir-at-law, paying a sum of money to *B.*: and it was held, “that paying did not make a condition, because no one could enter for the condition broken, but the devisee himself; but this would be a trust upon the land for raising the money.” If *James Messenger* did not comply with the condition, the specific bequest would fall into the residue; and being residuary legatee and executor, he would be entitled, in that character, to deal with the public-house and stock as his own, subject only to the burden of debts. Of course, therefore, he would take the property in the more advantageous character of executor and residuary legatee, instead of exposing himself to the indefinite liability annexed to the specific bequest.

Mr. *Sugden* and Mr. *Ching*, for the Defendants.

The principle of the decision of the Vice Chancellor was, that the lease of the public house, including the good will and the stock in trade, was given to *James*, in consideration of his paying the debts of the testator, and that, if *James* accepted the bequest, he became bound to pay the debts. The question is simply a case of construction;

(a) *Freem.* 136.

(b) 2 *Freem.* 278.

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 {
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struction; and has no connection with the technical doctrine of conditions as annexed to interests in land. *James* had, during four years, assisted the testator in his business; he knew what his debts were; he knew the value of the trade: and having taken the business, and renewed the lease in his own name, he must be considered as having undertaken the concomitant liability. If he did not mean to enter into possession as legatee, but merely as executor, he ought at the time to have manifested that purpose by a suitable protest.

Another question raised in the argument was, Whether the trust or condition extended to the *Woodside Farm* devised to *James Messenger*, or was confined to the bequest of the public-house and stock of liquors.

The LORD CHANCELLOR. (a)

The points raised in this cause depend entirely upon the terms of the will. The first question is, Whether the qualification, annexed to the bequest to *James Messenger*, is a trust or condition; and, the second, Whether it attaches upon the devise of the *Woodside Farm* as well as the *Gun* public-house, or upon the latter only. Now I am of opinion that the words "and my will is, that, in consideration of the above bequest to my son *James Messenger*, he shall pay, &c. all my just debts, &c." annex a condition to the bequest, but that the condition is annexed to the bequest of the public-house and stock in trade only, and not to the devise of the farm at *Woodside*. The testator's intention was, to give to his son, who had long been employed in his trade, the option of taking the business, provided he paid the debts.

(a) The judgment is given *ex relatione*.

debts. The testator does not provide for the payment of his debts thereout, but he makes the payment of his debts the price at which his son was to purchase the public-house and goodwill: and I see nothing unreasonable in such a bequest.

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 MESSENGER
 v.
 ANDREWS.

Another question made in this cause was, Whether the legatee has accepted the bequest, so as to be bound by the condition. If I were called upon to decide that question now, I confess I should hold that he has by his acts accepted this bequest and is bound by the condition. As he had resided many years with his father, and had managed this business for him, he must have had the best opportunity of knowing both the value of the premises and business, and the amount of his father's debts: still he would be entitled to a reasonable time and opportunity to judge of the value of the property and the burden of the condition. But how does he deal with this property? Immediately after his father's death he takes possession of it, carries on the trade for four years and upwards, sells and consumes the stock, and renews the lease as his own and in his own name. Under such circumstances, if I were now called upon to decide the point, it would be difficult to say that he had not accepted the bequest. If, however, it should turn out upon inquiry, as it has been alleged in argument, that the debts were five times more in amount than the value of the property, that would be a circumstance to be taken into consideration as evidence that it was not the legatee's intention to accept the legacy burdened by so onerous a condition; and the Master will allow due weight to it, as a circumstance of evidence, in the inquiry before him. But at present I can only affirm the Vice-Chancellor's judgment, so as to give both parties an opportunity of bringing all the facts of the case before the Court.

1828.

Jan. 25.

JACKSON v. BOURNE.

A cause was heard at the Rolls, but before judgment was pronounced, accidental circumstances rendered the hearing ineffectual; the Plaintiff then set it down before the Lord Chancellor, and obtained an order, of which the Defendant had notice, assigning it a particular position in the Lord Chancellor's paper, but did not serve a new *subpœna* to hear judgment: when it was called on before the Lord Chancellor, the Defendant made default, and the Plaintiff took a decree *nisi*: Held, that it was not necessary to serve a new *subpœna* to hear judgment, and that the decree *nisi* was strictly regular.

THE cause being set down at the Rolls, and a *subpœna* duly served, it came on to be heard, and was argued at great length before Sir *J. S. Copley*, Master of the Rolls; but judgment had not been given, when he was appointed Lord Chancellor, and the Defendant refused to consent to accept the Lord Chancellor's judgment. The Plaintiff then moved, upon notice, before the Lord Chancellor, that he might be at liberty to set down the cause before his Lordship, and that it might be put into his paper next after a particular appeal which was specified. The Defendant opposed the motion, but the order was made; and the cause appeared in the Lord Chancellor's paper. It was called on; the defendant made default; the Plaintiff took a decree *nisi*, and, in due time, served a *subpœna*, calling on the Defendant to show cause against making the decree absolute.

The Defendant now presented a petition, praying that it might be declared that the decree was irregularly obtained, and that all proceedings under it might be stayed.

Mr. *Agar*, in support of the petition.

The Defendant obeyed the *subpœna* to hear judgment, by appearing when the cause was originally heard at the Rolls; and if accidental circumstances have rendered it impossible that judgment should be pronounced there, the Defendant is not, for that reason, bound to attend before another branch of the Court, in order to enter again into the argument. The Plaintiff
has

has, in fact, set down his cause again, and he ought to have served another subpoena to hear judgment. *Beames's Orders*, 7, 197, 198.

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Mr. Knight, contra.

The cause is in the same state, as if it had never been heard at all; it must be considered as if it had remained in the Rolls paper; and it is every day's practice to transfer a cause from one branch of the court to another, and no new subpoena is necessary.

The LORD CHANCELLOR.

The hearing at the Rolls having been rendered by circumstances altogether ineffectual, I consider the cause to have been in the same position, as if that hearing had not taken place. It continued, therefore, in the paper of the Master of the Rolls as a cause to be heard there; but it was competent to the Plaintiff to apply to the Lord Chancellor for leave to set it down in this branch of the court, and to have it disposed of here. Such an application was made and granted, and the Defendant had notice of it, so that he could not complain of being taken by surprise. A subpoena to hear judgment had been served before the ineffectual hearing at the Rolls; and as the subpoena is general, and is not confined to any one branch of the court, he was bound to attend whenever the cause was called on for hearing; and if he chose to make default, he must abide by the consequence. The proceedings of the Plaintiff have been strictly regular; and this petition must be dismissed with costs.

1828.

Feb. 1.

MACDOUGAL v. PURRIER.

Leave refused in a tithe suit, to file a supplemental answer setting up a modus, after the cause had been set down for hearing.

THE bill was filed by a lay impropriator for tithes of a house in *London*. A decree *nisi* had been obtained; but the cause had been again set down.

The same Plaintiff had filed a bill in the Exchequer against the Leathersellers' Company for tithes of other premises in the same parish. In that suit the Defendants had insisted upon a modus, which, if valid, would cover, it was alleged, not only the premises occupied by the Company, but the whole or the greater part of the present Defendant's house. The modus, it was said, had been made out by very strong evidence; and, in *Trinity* term 1827, the Court of Exchequer had directed an issue to try its validity.

A motion was now made, that the Defendant might be at liberty to file a supplemental answer for the purpose of insisting upon this customary payment as a modus, and to examine witnesses in support of it. The Defendant and his solicitor stated, by their affidavits, that it was not till after the hearing of the cause in the Exchequer, that they had any knowledge of the evidence by which the modus might be established, or the scite, covered by it, defined.

Mr. *Boteler*, in support of the motion, cited *Const v. Barr*. (a) The suit, he argued, as it now stood, could not determine the question between the parties; and the Defendant was willing to indemnify the Plaintiff as to any extra costs which might be occasioned by setting up

(a) 2 *Mer.* 57.

up a new defence in so advanced a stage of the proceedings.

1828.

M'DOUGAL
v.
PURRIER.

Mr. Roupell, *contra*.

The LORD CHANCELLOR said, that it was impossible to put the Plaintiff in the same situation as he would have been in, if this defence had been stated on the record in due time; and he refused the motion with costs.

FOXCRRAFT v. WOOD.

Feb. 12.

FENNELLS had purchased a business in *Birmingham*, which was carried on for his profit, and with his capital, in the name of *Foxcraft*, who was merely his agent at a fixed salary. *Fennell* having become bankrupt, *Foxcraft* filed his bill, stating that, by reason of the use of his name for the purposes of the trade, he was under heavy liabilities for the concern, which was solvent, notwithstanding the bankruptcy of *Fennell*, and praying that the assignees and messenger under the commission might be respectively restrained from taking possession of or selling the business or concern, or the premises where it was carried on, or the stock in trade and effects thereof, and from collecting or receiving any monies due or owing to the concern, or in any wise intermeddling or interfering therewith.

A business, which was the property of *A.*, was carried on in the name of *B.*, who was the agent of *A.* at a fixed salary; *A.* being under considerable liabilities in respect of that business, *B.* became bankrupt; *A.* was held to have a lien on the property of the concern to the extent of his liabilities; and the assignees of *B.* were restrained from interfering with the business or the property belonging to it, and from receiving monies due to it.

The Vice-Chancellor had granted the injunction.

The Defendants now moved before the Lord Chancellor to dissolve the injunction.

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Mr. *Pepys* and Mr. *Coombe*, for the motion.

Mr. *Bickersteth*, *contra*.

In support of the motion it was argued that there was no precedent for restraining the assignees under a commission of bankrupt from taking possession of property, which unquestionably belonged to the bankrupt. The whole of the business, carried on in the name of *Foxcraft*, was *Fennell's*: the assignees were entitled to the possession of it; and the claim of *Foxcraft* would be the subject of account between him and the estate of the bankrupt.

On the other hand, it was said that the Vice-Chancellor had granted the injunction, on the principle that the property ought not to be taken out of the hands of the agent, till he was indemnified against his liabilities. In *Drinkwater v. Goodwin* (a) it was held that a factor, who became surety for his principal, had a lien on the price of the goods sold by him as such factor, to the amount of the sum for which he was surety. Here *Foxcraft*, as between him and *Fennell*, was surety for the latter, so far as regarded the debts of this particular business; he had therefore a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liabilities which he had incurred on account of it; and he had a right to have the proceeds of the property applied in the discharge of those liabilities.

The LORD CHANCELLOR was of opinion that the injunction had been granted properly, and refused the motion with costs.

(a) *Cowp.* 251.

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IN the twenty-seventh year of *Henry VIII.* the priory of *Armathwaite*, which was one of the lesser monasteries, and had been founded by *William Rufus*, was dissolved. In an ecclesiastical survey, made in the preceding year, the property of the monastery was estimated to be of the yearly value of 19*l.* 2*s.* 2*d.*; and the two first items in the estimate were the following:—“*Agnes Darwentwater*, priorissa domus conventualis monalium de *Armethuat*, infra comitatum *Cumbriae*, patrona ecclesiae parochialis de *Aynstabye*, habet rectoriam de *Aynstabye*, que valet in decimis granorum ejusdem parochie, vi *l.*”—“*Idem Agnes* habet mansionem sive glebam de *Armethuate* predicta in manibus suis propriis, que valent per annum communibus annis, xlvj *s.* viij *d.*” From the accounts of the bailiff of the possessions of the monastery, for the year ending at *Michaelmas*, in the twenty-eighth year of *Henry VIII.*, it appeared that the lands previously in the occupation of the priory were worth 3*l.* 9*s.* a year; that the other lands, holden by the priory, produced 10*l.* 13*s.* 4*d.* a year; and that “the rectory of *Anestaplith*, with the tithes thereunto belonging,” were reckoned at 6*l.* a year; making a total of 20*l.* 2*s.* 4*d.* An ecclesiastical survey in the twenty-ninth year of *Henry VIII.*, after enumerating the demesne lands, which in it also were valued at 3*l.* 9*s.* a year, and the other temporalities of the priory, estimated at 10*l.* 13*s.* 4*d.* a year, concluded the description of the property of this religious house with the following entry:—“*Item.* Parsonage of *Anestaplith* w^h all man. of Tethes and oblacions thereunto belonging, w^h the Tethes of the Demanes of the sayd late monastery, renuying w^hin the same, by yere, vi *l.*”

In a suit by an improper rector for the tithes of lands, in respect of which there is no evidence that tithes have ever been paid to the rector, an issue will not be directed, if all the evidence, which can be supplied, is adduced in the cause, and the Court is of opinion, that, upon that evidence, a jury would not be justified in finding in favour of the defence set up by the occupier of the lands.

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In the 30th year of *Henry VIII.*, the crown granted a lease for twenty-one years of the whole of the property of the late monastery to one *Leonard Barrow*, reserving a yearly rent of 14*l.* 2*s.* 4*d.* for the temporalities, and of 6*l.* for the rectory of *Ainstable* and the tithes. In the 3rd year of *Edward VI.*, the crown, in consideration of a large sum of money, granted to Sir *John Peryent* and *Thomas Reve* a considerable mass of property, including, among other hereditaments, the rectory and church of *Ainstable*, with its appurtenances, lately the property of the priory of *Armathwaite*, and all lands, glebes, tithes, &c. thereto belonging. The Plaintiff in the present suit was now seised of the impropriate rectory under a title derived from *Peryent* and *Reve*.

In the 6th year of *Edward VI.*, the crown granted to *William Græme* all the temporalities of the priory, including the demesne lands; and the latter, by several mesne conveyances, had become vested in the Defendant. Neither in the grant to *Græme* nor in any of the subsequent conveyances of old date, was there any express mention of tithes.

The bill was filed by the Plaintiff, as impropriate rector of *Ainstable*, for an account of the tithes of lands in *Armathwaite* occupied by the Defendant.

The defence made was, that the lands in question were part of the demesne lands of the priory of *Armathwaite* before its dissolution; that the tithes of these demesne lands did not belong to the rectory, but constituted a distinct portion of tithes, and, as such, had been part of the possessions of the priory, and had now, by divers mesne assurances, become vested in the Plaintiff; and that the owners for the time being of the demesne lands and portion of tithes had, in respect of such their
 ownership,

ownership, always contributed to the repairs of the chancel of the parish church of *Ainstable*. The lands had not paid tithes within time of living memory; and there was no evidence that tithes had ever been paid in respect of them.

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At the hearing of the cause on the 12th of *November* 1825, the Vice-Chancellor gave the Plaintiff a decree with costs. Against this decree the Defendant appealed.

Mr. *Bickersteth* and Mr. *Boteler*, for the appeal.

As the lands have never paid tithes *de facto*, the only question is, whether the nonpayment can be referred to a legal origin? Now there is every ground for believing, that in very early times there was a church in *Armathwaite*; for it appears by the plea roll, in the twentieth year of *Edward I.*, that a lawsuit, in which the prioress was defendant, was compromised on certain terms, one of which was, that the Plaintiff, in that action, should hold his lands of the prioress and her successors, rendering to her and them homage and the service of 20s., "*pro omni servitio ad prædictam priorissam et ecclesiam suam de Ermytethwaite, et successores suas pertinente.*" The ecclesiastical survey, in the twenty-sixth year of *Henry VIII.*, specifies, among the possessions of the monastery, "*man-sionem sive glebam de Armethwaite,*" which shews that there was a glebe at *Armathwaite*, and probably, therefore, a church, distinct from the glebe and church at *Ainstable*. The natural inference from this state of things is, that the tithes of *Armathwaite* never belonged to the rectory of *Ainstable*, but were enjoyed by the monastery as a distinct portion; and that conclusion is further corroborated by the circumstance, that, till within the last forty years, *Armathwaite* was not usually described as within the parish of *Ainstable*. The reparation of the chancel is a burden which generally accompanies the

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ownership of tithes; and, in the present case, the owner of the lands in question is bound to defray one half of that expense. The existence of that obligation is easily explained on the supposition that it arises from his ownership of a portion of tithes.

These circumstances create a reasonable presumption in favour of the Defendant. But the ecclesiastical survey of the twenty-ninth year of *Henry VIII.* affords evidence of a more direct nature. The words of it are, "*Item. Parsonage of Anistapleth, with all manner of tithes and oblations thereunto belonging, with the tithes of the demanes of the said late monastery renewing within the same, by the year, vj li.*" Here mention is made, first, of the parsonage, with all manner of tithes thereunto belonging; and next, of the tithes of the demesne lands of the monastery. The necessary inference is, that the tithes of the demesnes of the monastery were not parcel of the tithes belonging to the parsonage; in other words, that they existed as a distinct portion of tithes.

The general words in the grants and conveyances, under which the Defendant claims, were sufficient to pass the tithes of the demesne lands; and from the dissolution of the monastery down to the present time, there has been an uninterrupted enjoyment of the tithes by the owners of these demesne lands for the time being. On the other side, there is nothing except a mere grant of the rectory, not followed by any perpancy of tithes, in any part of this district. How is it possible to say, that, under such circumstances, the Plaintiff *must* have a title, and the Defendant *can* have no title, to the tithes in question? Some of the facts connected with the case are involved in a certain degree of obscurity, arising from the lapse of three centuries, during which the alleged title of the Plaintiff has been allowed to slumber. But, after so long

long an enjoyment of the tithes by the owners of the demesne lands, every presumption ought to be made in their favour, *Oxenden v. Skinner* (a): at least, the Court cannot decide conclusively in favour of a title involved in so much darkness as is that of the Plaintiff, but will leave it to a jury to decide between the parties. *Lord Petre v. Blencoe*. (b)

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Mr. Horne, Mr. Duckworth and Mr. Bagshaw, *contrâ*.

There is no reason to believe that there, at any time, existed at *Armathwaite*, a church distinct from the monastery. *Ecclesiam suam*, in the extract from the plea roll, denotes the monastery itself: "*glebam*," in the ecclesiastical survey of the twenty-sixth year of *Henry VIII.*, denotes merely the property of the monastery in *Armathwaite*: * for glebe is defined to be, *dos et solum ecclesiæ*. Even if it were admitted, that in early times there had been a church at *Armathwaite*, how does it follow that the tithes of the demesne lands were severed from the rectory? The specific mention, which is made in the ecclesiastical survey of the twenty-ninth year of *Henry VIII.*, of the tithes of the demesne lands, was naturally suggested by the change of circumstances which had recently taken place. Before the dissolution, the monastery, though entitled to the profits of the rectory, would not actually receive tithes in respect of the demesne lands which were in their own occupation: but, upon the dissolution, tithes became payable by the actual occupiers of the demesne lands to the owner of the rectory. No inference, as to the right to receive tithes or the liability to pay

(a) *Gwill.* 1513.

(b) 3 *Ans.* 945.

* The entry in that survey, immediately following the two entries mentioned *supra*, at p. 489, begins with these words, "Idem Agnes habet unum tene-
 mentum dictæ *glebæ* in tenura Ricardi Thomson," &c.

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pay them, can be drawn from the obligation of the Defendant to contribute to the repair of the chancel. It is stated by *Burn* in his *Ecclesiastical Law* (a), that, though the parson is bound to repair the chancel, yet "if the custom hath been for the parish or the estate of a particular person to repair the chancel, that custom shall be good, and the repairing of the chancel is a discharge from contributing to the repair of the church."

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The LORD CHANCELLOR.

Mr. *Ross* is the impropriate rector of the parish of *Ainstable*; the Defendant, Mr. *Francis Aglionby*, is the proprietor of certain lands situate within the limits of that parish. Mr. *Ross*, therefore, as the impropriate rector, is entitled to the tithes of the lands occupied by Mr. *Aglionby*, unless Mr. *Aglionby* can shew some specific exemption.

It appears on the evidence that these lands have never in fact, within the memory of any living witness, paid tithes; and there is no evidence whatever to shew that any tithes have ever been paid by the occupiers of these lands to the rector of the parish of *Ainstable*. Still that is not sufficient to entitle the Defendant to an exemption from the payment of tithes. It is stated, however, in the answer, by way of defence to the claim, that the property, possessed by Mr. *Aglionby*, was formerly parcel of the demesnes of the priory of *Armathwaite*, situate in the county of *Cumberland*: and that the priory, at the time of the dissolution, possessed not only these demesne lands and other lands, but also the tithes of these demesne lands as a portion of tithes, distinct from the tithes of the rectory of *Ainstable*. The *onus* of proof is thrown entirely

(a) Vol. I. 350, 351.

entirely on the Defendant: and if the Defendant can make out that the priory, at the time of its dissolution, was entitled to these tithes, as a portion of tithes distinct from the rectory, of course he will be entitled to an exemption.

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Various documentary evidence has been laid before the Court, for the purpose of establishing this fact. The first, to which I shall advert, is the ecclesiastical survey in the twenty-sixth year of *Henry VIII.* By that survey, it appears that *Agnes Darwentwater*, prioress of the convent-house of the nuns of *Armathwaite*, had the rectory of *Ainstable*, which was worth, of the tithes of corn in the same parish, 6*l.* The value of the rectory is there stated at 6*l.*, and the rectory was, at that time, the property of the prioress. In the following year, the priory was dissolved; and in the twenty-eighth year of *Henry VIII.*, a year after the dissolution, there is an account of *John Green*, the bailiff and collector of the farms and rents incident to this property. *John Green*, in this account, states the value of the demesne lands at 3*l.* 9*s.* a year, and mentions that there were other possessions of the priory, situate in divers villis, the value of which he takes at 10*l.* 13*s.* 4*d.* in the year, the whole amounting to 14*l.* 2*s.* 4*d.*: and then an item comes, which he calls "issues of the spiritualities." It follows, therefore, from the form of the account, that the portion of it, which precedes this last mentioned item, is to be considered as an account of the temporalities; and there is no mention in the previous part of the account of any portion of tithes, nor under the head of spiritualities is there any mention whatever of any portion of tithes. The entry is in these words, "Spiritual issues, — and for 6*l.* of the issues or profits of the rectory of *Ainstable*, to wit, in all manner of tithes to the said rectory belonging, &c.:" so that it appears, that, at that period, according to

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to the bailiff's return, the value of the rectory was stated at 6*l.*, corresponding precisely in that respect with the ecclesiastical survey in the twenty-sixth year of *Henry VIII.*

The next document, which was referred to, was the ecclesiastical survey of the twenty-ninth year of *Henry VIII.*; and upon it the principal reliance has been placed. In this document, the demesne lands are set out with more particularity than in the former survey. The names of the different closes are specified, and the annual value of each; and the demesnes are there estimated at 3*l.* 9*s.* a year, corresponding with the amount stated in the account of the preceding year. The value of the property in the divers vills, also, is stated at 10*l.* 18*s.* 4*d.*, corresponding with the value given by the bailiff; and the sum total of the temporalities is stated at 14*l.* 2*s.* 4*d.*; but there is no mention made of any portion of tithes. Then comes the clause, on which the principal reliance has been placed. "Item, parsonage of *Anestapleth*, with all manner of tithes and oblations thereunto belonging, with the tithes of the demesnes of the said late monastery, renewing within the same, by year, 6*l.*" This corresponds in amount with the previous survey and with the bailiff's account, in which the value of the tithes of the rectory is stated at 6*l.* But it is argued from the language of this entry—"with the tithes of the demesnes of the said late monastery, renewing within the same,"—that the tithes of the demesne lands are exclusive of the rectorial tithes, and are by construction separated from the rectorial tithes. It appears, it is said, from the language of the entry, that they form no part of the rectorial tithes, but are a distinct and separate parcel of themselves. I do not think this follows of necessity from the language of the instrument. We may construe the word *with* as equivalent

lent to "*embracing* the tithes of the demesnes of the said late monastery." The parsonage of *Anestapleth*, means the rectory of *Ainstaple*: in the clause — "with all manner of oblations and tithes thereunto belonging," *with* obviously means *embracing* and *including*: therefore when the entry goes on further to say — "with the tithes of the demesnes of the said late monastery," there is no reason, construing one part of this passage with the other, to say that the word *with*, on the second occasion when it is used, may not have the same interpretation as on the first. I think, therefore, we may, in this instance, construe *with the tithes of the demesnes*, as synonymous with *embracing and including the tithes of the demesnes*. All the tithes here mentioned are valued at 6*l.* Now this sum of 6*l.* corresponds with the two previous entries, in which it is distinctly stated that 6*l.* was the value of the rectory, — not the value of the rectory and something more, but the value of the rectory alone: and as 6*l.* is here stated to be the annual value of the parsonage, "with all the tithes and oblations thereunto belonging, with the tithes of the demesnes of the said late monastery," it is reasonable to infer that these latter tithes formed, at that period, a part of the rectory. Why they are mentioned at this particular period, may be thus explained, — that, as the prioress had been the proprietor of the rectory, and also occupier of the lands, and therefore paid no tithes to herself, it was considered proper, by way of precaution, after the dissolution, to make specific mention of the tithes of the demesnes, for the purpose of shewing that these lands were titheable, and that the tithes formed a part of the rectory.

In the course of the argument it was urged, that it was possible that the tithes of these demesne lands might be included in the other sums mentioned in the surveys and the accounts; and that, as the prioress was the occupier

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occupier of the lands, and was also entitled to the profits of the rectory, there was no reason why the tithes should not be included in the return of the value of the demesnes. The argument is utterly inconsistent with the documents; because, in the first place, the former sum of 14*l.* 2*s.* 4*d.* is stated to be the total of the temporalities; and then it is afterwards said, in the last passage to which I have referred, that the tithes of the demesnes, whatever those tithes might be, are included in the sum of 6*l.*; and if they are included in the sum of 6*l.*, they could not be included in the previous return. Therefore I think it is obvious, that what was called the rectory in two previous documents, is more particularly stated in this document, as the tithes of the rectory, together with the tithes of these demesne lands, which had been for a long period occupied by the person who was the owner of the rectory.

If we go on further, we find that the subsequent documents are built on these returns. I rather think that the survey in the twenty-ninth year of *Henry VIII.* was the foundation of the lease in the following year to *Leonard Barrow*. In that lease the same language is found; the temporalities are there stated at 14*l.* 2*s.* 4*d.*, and the spiritualities, at 6*l.* The property was afterwards sold, and divided into two portions: the rectory went to one person, and the rest of the property, to another. I admit that the language of the conveyance of the demesne lands — the general words which occur in it, — are sufficiently large to include a portion of tithes, provided it were established that a portion of tithes, separate from the rectory, had ever existed. But if a portion of tithes separate from the rectory had ever existed, and if it was meant that it should be included in the grant, it is not improbable that such a portion of tithes would have been especially named, and that it would
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not have been left to pass by general words. It is also material to observe, that, from that period down to the present time, in the various conveyances of the property, no mention is made of any portion of tithes. In one document, indeed, the lands are stated to be tithe-free,—a representation obviously founded on that nonpayment of tithes, to which, if it had any thing to support it, I should have been extremely desirous of giving effect.

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One of the documents contains the words, “the prioress and her church, also the demesnes or glebe;” but I think very little reliance is to be placed on these expressions. The priory was a religious establishment. It appears, according to the survey of the twenty-sixth of *Henry VIII.*, that there was a chaplain who performed divine service every day in the establishment, and there was probably a church. With respect to the term *glebe*, it means nothing more than ecclesiastical property. Some reliance was placed on another circumstance, that the owners of this property contributed to the repairs of the chancel, and paid no church-rates. But property may be charged by prescription with the repair of a chancel; and where a party is bound, in respect of his property, to repair the chancel, or to repair part of the chancel, or to contribute to the repair of the chancel, he is relieved from the payment of church-rates.

Upon the whole, the case resolves itself into nonpayment of tithes for a very long period. I have looked most anxiously into the documents for the purpose of endeavouring to find out any evidence to give a legal origin to this exemption; but I can find nothing to satisfy me, that a separate and distinct portion of tithes did ever exist. I think, therefore, that, were this evidence (and it is not possible



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possible to throw any further light on the subject) presented to a jury, they would not be justified in finding that a portion of tithes, distinct from the rectory, ever had existed. Under such circumstances, I do not think it right to direct an issue, and the judgment of the Vice-Chancellor must be affirmed.

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CAPEL v. WOOD.

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A testator devised premises, which he held by lease under the dean and chapter of Westminster, to A. for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after A.'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until B. should attain his age of twenty-one

THE will of *Henry Capel*, dated the 9th of *May* 1802, contained the following bequest:—

“ I give and bequeath unto *Mary Wood*, during her own natural life, all these two leasehold messuages and premises situate in *Northumberland Street*, which I hold under the Duke of *Northumberland*, to hold to her the said *Mary Wood* during her natural life, all my estate, remainder of the term, and all my interest therein, subject nevertheless to the payment of the several rents, and the performance of all and singular the covenants, clauses, and agreements which, on the lessee's part and behalf, are to be paid, done, and performed. *Item*, I further give and bequeath to the aforesaid *Mary Wood*, likewise during her own natural life, all that messuage and premises situate in the *Strand*, which I hold under the dean and chapter of *Westminster*, to hold, during her own natural life only, all my estate, right, title, and interest therein, subject nevertheless to the payment of all

years, to whom the testator bequeathed all the remaining term and interest which he had in the lease: the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the dean and chapter was, to renew every seven years on receiving a reasonable fine; and, at the death of the testator, about thirty years of the term were unexpired: Held, that A. was not bound to renew the lease at any time during her life.

all *finés and rents as they become due yearly and for every year*, and likewise to the due performance of all and singular the covenants, clauses, and agreements which, on the lessee's part and behalf, are to be paid, done, and performed. And I further will and direct, that as soon and immediately on the decease of her the said *Mary Wood*, all the aforesaid leasehold estates shall be vested in and unto *John Girdler* and *William Tothill*," (who were two of his executors,) "their executors and administrators, in trust that they manage and do the best for the interests and improvements thereof as their judgment shall direct; that they receive all rents due or to become due thereon, out of which, nevertheless, they shall, during the time of their said trust, have care to pay all fines, rents due, and other demands, and be subject to all the covenants, clauses, and agreements, which, on the lessee's part, are to be paid, done, and performed. And it is my will the said trust do commence immediately on the decease of the said *Mary Wood*, and to be continued until my great nephew *William Capel* shall attain and complete his full age of twenty-one years, when the said trust shall cease, and then be conveyed or assigned over to him the aforesaid *William Capel*, to whom and his heirs lawfully begotten, I do hereby will and bequeath the same, to have and to hold all the remaining term, right, title, and interest which I now have in all the aforesaid leases in *Northumberland Street* and the *Strand*, with all accumulation (if any) thereon."

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The testator died on the 12th of *July* 1802. The lease of the house held under the dean and chapter of *Westminster* was for forty years from *Michaelmas* 1792, at a yearly rent of 12s. The lease contained a covenant, "that it should not be lawful for the executors, administrators, or assigns of the lessee, after his decease, cessation,

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cession, grant, or dismissal, to enter into the premises, or occupy the residue of the term, without a new grant thereof from the dean and chapter, or their successors, according to the custom used, and upon payment of the customary fees." There was no covenant for renewal.

Mary Wood having continued to enjoy this leasehold without having renewed the term, *Capel Wood*, who had now attained his full age, in *August 1822* filed his bill against her, alleging, that, though it was not usual for the dean and chapter of *Westminster* to covenant for renewal in the leases granted by them, yet it was customary for them, upon the application of the parties beneficially entitled, to renew the leases every seven years upon payment of fines calculated according to the portion of the term which had expired. The prayer was, that she might be decreed to procure from the dean and chapter a renewal of the lease, so as to make the unexpired term thereof as beneficial to the Plaintiff, as if she had renewed it at the customary intervals, and that she might pay the fine which should be necessary for that purpose.

Mary Wood died, and the suit was revived against her personal representatives.

George G. Vincent, the chapter-clerk of the dean and chapter of *Westminster*, proved, that, with respect to houses demised for forty years, the custom of the dean and chapter is; at the end of the first fourteen years, or any subsequent time, to grant renewals, so as to make up the term of forty years; that these renewals are generally made upon the terms expressed in the original lease, and in consideration of fines, which, though their amount depends entirely on the pleasure of the lessors,

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are moderate and reasonable; and that the dean and chapter never refuse to renew, when the terms they require are complied with.

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Mr. *Heald* and Mr. *Whitmarsh*, for the Plaintiff.

The principle, on which cases of this kind are to be determined, is alluded to by the Lord Chancellor in *White v. White*. (a) "A person entitled for his own life is not bound to renew, except from the terms of the will or the nature and formation of the gift to him, you can imply an intention, that he should be obliged to renew." *Mountford v. Cadogan*. (b) Here both the grounds are found, either of which would be sufficient to create an obligation to renew. First, it never could have been the intention of the testator to permit the lease to expire. The custom of renewal was a privilege, which he could not mean to lose; and if there was no renewal, the probability was, that the remainder-man would take little or no benefit. The object of the testator was, to give to his legatees the utmost extent of interest that could be had under the dean and chapter. Therefore, the nature and formation of the gift shew an intention that the lease should be renewed.

Secondly, the words of the will manifest the same intention. The tenant for life is to hold the premises, subject to the payment of all fines and rents. The only payment, to which the lease was subject, was the yearly sum of 12s.; and there is nothing to answer to the word "fines," except the fines payable upon renewal. The word does not occur in the clause which relates to the lease holden under the Duke of *Northumberland*: why should it have been introduced in reference to this lease? The testator expressly directs, that, after the death

(a) 9 *Ves.* 561.

(b) 19 *Ves.* 635.

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death of the tenant for life, all his leaseholds shall vest in his trustees, and shall be assigned to the Plaintiff when he attains twenty-one. This implies that, so far as the acts of persons taking benefits under, or acting in, the trusts of his will can preserve them, the leases shall not be permitted to expire: and they can be prevented from expiring, only by being renewed in the usual manner. As the trustees were to execute these trusts during the infancy of the Plaintiff, the obligation on them to renew is expressed in more precise terms than that which attaches upon the tenant for life; but there would be little consistency in supposing that the testator meant that the trustees for the remainder-man should, but that the preceding taker should not, be bound to renew the lease.

Mr. *Shadwell* and Mr. *Merivale*, for one Defendant.

Mr. *Sugden* and Mr. *Bethell*, for another Defendant.

The cases cited have no application; for in them a clear trust for renewal was raised, and the question was merely as to the mode in which the trust ought to be executed. Here it is denied, that there are any words in the will, which can raise a trust for renewal. It would be a violent straining of language to found such a construction upon the occurrence of the word "fines," which was probably inserted to include any money payments, other than the yearly rent, which might become due — the fees, for instance, which were to be paid upon the transmission of the term, by the death or assignment of the lessee, to those who derived an interest from him. In no sense could the tenant for life be said to hold the lease subject to fines for renewal; for there was no obligation on him to renew, and he had no right to demand a renewal. Any renewal would have been a purchase, on such terms as might be mutually agreed upon,

upon, of a further interest from the ecclesiastical corporation. The custom of renewing, which is alleged in the bill, is altogether different from that which the evidence proves to have existed. It may be true, that, if the trust, during the infancy of the Plaintiff, had taken effect, the trustees would have been bound to renew; but what inference can be drawn from the circumstance of the testator's having expressed with tolerable clearness his intention that certain persons, while their interest lasted, should be bound to renew, except that, where no such intention is expressed, no such intention existed?

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v.
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Lord GIFFORD, MASTER of the ROLLS.

There is nothing in this lease which renders it compulsory either on the lessee to take, or on the lessor to grant, a renewed term. But it is said that there is a habit of renewing on such terms as the dean and chapter think fit to impose; that they are accustomed to renew on the payment of certain fines; and that this lease is given to the tenant for life subject to the payment of all fines and rents, among which must be included the fines usually paid on renewals. Thus, the question in substance is, whether, under the word "fines," there is to be imposed on the tenant for life a condition of renewing according to this habit. If she were bound so to renew, she ought to have renewed within four years after the decease of the testator; and she might have been called upon to pay, in the shape of fines, sums greater than the benefit which she derived from the estate. More than an inference should appear on the face of the will to induce the Court to impose such an obligation on the tenant for life.

In a subsequent part of his will, the testator directs,
"that his trustees manage and do the best for the in-

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terests and improvements of his leasehold estates; that they receive all rents due or to become due thereon, out of which they shall, during the time of their trust, have care to pay all fines, rents, dues, and demands." This trust is to continue, till *William Capel* shall have attained twenty-one; at which time the trustees are to assign to him all the testator's remaining term and interest in the leaseholds. It may be, that, under this clause, the trustees would be bound to renew, though it is not perfectly clear that they would be under such an obligation. But the question is, does the word "fine" impose a condition on the tenant for life under the alleged usage or custom? My opinion is, that it does not.

The bill was dismissed with costs.

From this decree the Plaintiff appealed.

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Feb. 25.

The argument was to the same effect as at the original hearing.

The LORD CHANCELLOR concurred in opinion with the late Master of the Rolls, and dismissed the appeal.

1828.

PRATT v. BARKER.

Feb. 28.
March 1.

THE bill was filed in *May* 1821, for the purpose of setting aside a voluntary deed and two powers of attorney which the Plaintiff had executed in the preceding *December*, and under which a considerable sum of stock had been transferred to two of the Defendants, upon trust, after his death, for the benefit of themselves and certain other persons.

The Court refused to set aside a voluntary deed executed by an old and infirm man, in favour of a person who had attended him as a surgeon, and had been occasionally consulted by him respecting the management of his property, and received the dividends of some stock for him; it appearing that the nature and effect of the deed were fully explained to the grantor by his solicitor, before he executed it, and that he executed it of his own free will.

The facts of the case are stated in 1 *Sim.* 1.

The Vice-Chancellor having dismissed the bill with costs, the Plaintiff appealed.

Mr. *Horne* and Mr. *Wilbraham*, for the appeal.

Mr. *Sugden* and Mr. *Spence*, *contrd.*

The LORD CHANCELLOR, in the course of the argument, expressed his opinion, that it was made out in evidence, that the execution of the deed and the transfer of the stock were the free and voluntary acts of *Pratt*; that he not only meant to do what he had done, but was acquainted with the nature and effect of what he did; and that there had been, in the affair, the intervention of a disinterested third person.

Finally, his Lordship affirmed the decree for the reasons stated in the judgment of the Vice-Chancellor.

1828.

March 8.

HEWES v. HEWES.

An attachment, sealed after an order for time has been obtained, but before it has been served on, or notified to, the Plaintiff, is regular.

THE Defendants entered their appearance on the 19th of *October*. On the 29th, the Plaintiff called on them to obtain the usual order for time; and, on the 5th of *November*, he repeated his application. On the 13th of *November*, he caused attachments to be sealed against them.

On the 8th of *November*, a petition for time to answer had been lodged at the Rolls and answered; and the order was obtained immediately afterwards; but it was not served, nor was any notice of it given to the Plaintiff, till the 13th, after the attachments had been sealed.

The Plaintiff now moved that the order for time might be discharged.

Mr. *Wilbraham*, for the motion.

An order of course is a nullity, until it is served*, *Young v. Smith* (a), *Tanner v. Dean* (b); and the attachment must be considered as sealed from the first moment of the 13th. *Stephens v. Neale*. (c) The Defendants, therefore, were in contempt, before any order for time had a legal existence. *Newcombe v. Rawlings* (d), and *Wallis v. Glynn* (e), are authorities in point.

Mr.

(a) 3 *Mad.* 196.

(d) 3 *Mad.* 246.

(b) 4 *Mad.* 166.

(e) 19 *Ves.* 380. and *Cooper*,

(c) 1 *Mad.* 550.

282.

* See *Lorimer v. Lorimer*, 1 *Jac. & Walk.* 284.

Mr. *Treslove*, *contra*.

The order was regular, when it was obtained; and it cannot be rendered irregular by subsequent acts of the Plaintiff. If there is irregularity any where, it is in the conduct of the Plaintiff, who has caused attachments to be sealed against Defendants, who had previously obtained an order for time to answer. His ignorance of that fact may be a reason for not making him pay costs, provided he does not seek to enforce the attachments: but it cannot deprive the Defendants of the benefit of their order.

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The LORD CHANCELLOR was of opinion that the attachments, being sealed before the order for time was served, were regular; but, instead of discharging the order for time, he allowed it to stand, and directed that the Defendants should pay the cost of the attachments and of the present motion.

1828.

March 8.

FARQUHARSON v. PITCHER.

Where a Defendant dismisses a bill for want of prosecution, without having made a motion of which he had given notice, the Plaintiff cannot afterwards obtain an order for the payment of the costs of that motion, as being a motion abandoned.

IN this case, the Defendant, having put in his answer, gave notice of a motion to dissolve an injunction which had been obtained: but, in consequence of the state of business in the Court, it stood over from time to time, so that, before it had been made, he was in a condition to dismiss the bill for want of prosecution. Accordingly, an order of dismissal was obtained, as of course. On the 5th of June 1827, the Plaintiff moved to discharge the order of dismissal as irregular; and on the 27th of the same month, the Lord Chancellor refused the motion with costs.* On the same day, the Plaintiff obtained an order of course that the Defendant should pay the costs of the motion to dissolve the injunction, as being a motion which he had abandoned.

The Defendant now moved to discharge that order with costs, for irregularity.

Mr. *Horne* and Mr. *Swanston*, in support of the application, argued, that the order of dismissal put an end to every proceeding in the suit; that no subsequent step could be taken, except for the purpose of carrying into execution the order of dismissal; and that, after that order, it was not competent to the Plaintiff to obtain an order for the payment and taxation of the costs of a motion alleged to have been abandoned. They further argued that the motion could not be considered as having been abandoned. It was a pending motion up to the time of dismissal; and as the order of dismissal put

* Sec 5 *Russell*, 385.

put an end to the injunction, the motion then became useless, and to have made it would have been equally futile and irregular. In fact, the dissolution of the injunction was included in the order to dismiss.

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Mr. Agar, *contra*.

The LORD CHANCELLOR discharged the order obtained by the Plaintiff, but without costs.

*ing. V. Linner
1859 - 18 Aug.
12-9th ed.*

DEW v. CLARKE.

March 21. 24.

THOMAS CLARKE and *Valentine Clarke* were residuary legatees under an alleged will of *Ely Stott*: and, the executors named in it having renounced probate, they, as such residuary legatees, obtained letters of administration to him with his will annexed, and, as his personal representatives, procured large sums of stock, part of his assets, to be transferred into their names. Mrs. *Dew*, the only child and sole next of kin of *Ely Stott*, instituted proceedings in the prerogative court, impeaching his sanity: and, on the 12th of April 1826, the judge of that court pronounced against the validity of the pretended will, recalled the letters of administration which had been granted to the *Clarks*, declared *Ely Stott* to have died intestate, and decreed letters of administration to be granted to Mrs. *Dew*. This judgment was affirmed by the court of delegates in February 1828.

A., as administrator of a person deceased, has stocks, part of the assets, standing in his name; the letters of administration granted to *A.* are recalled, and administration is granted to *B.*, the sole next of kin of the deceased: Held, that *A.* is not, within the meaning of the 6 G. 4. c. 74., a trustee of the stocks, which, as administrator, had been transferred into his name.

Mrs. *Dew* and her husband had also instituted a suit for the protection of the assets pending the litigation in the

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the ecclesiastical court; and, on the 17th of *July* 1826, an order had been made, that *Thomas Clarke* and *Valentine Clarke* should transfer into the name of the Accountant-general to the credit of the cause certain sums of stock, which they, by their answer, admitted to be part of the assets of *Ely Stott*. That order they did not obey: *Valentine Clarke* went abroad, where he still remained; and *Thomas Clarke* was a prisoner in the *Fleet*, for the contempt.

A petition was now presented by Mr. and Mrs. *Dew*, under the 6 *Geo. IV. c. 74.*, praying that an officer of the Bank of *England*, or some other fit person, might be appointed to transfer to Mrs. *Dew* the sums of stock mentioned in the order of the 17th of *July* 1826.

The only question was, whether *Thomas Clarke* and *Valentine Clarke* were trustees within the meaning of the act.

Mr. *Sugden*, Mr. *Knight* and Mr. *Garratt*, for the petition.

These stocks are standing in the names of *Thomas* and *Valentine Clarke*: they have refused to transfer them; and *Valentine Clarke* is out of the jurisdiction. The only question then is, are they trustees? They admit that the stocks are part of the assets of *Ely Stott*, they held them originally as his administrators; that title is now destroyed: and the proceedings in the ecclesiastical courts have ascertained, that the only valid title is in Mrs. *Dew*. These Defendants are, therefore, bare trustees, and come within the operation of the seventh section of the 6 *Geo. IV. c. 74.* The words of that section are general; and there is no reason why they should be restricted to trustees created in a particular manner: it is enough,

enough, if the trust be so clearly established, that no reasonable doubt can be entertained with respect to it. This trust cannot, with any propriety of speech, be called a constructive trust. It does not arise by any implication of law, but is the necessary result of the instruments, under which these stocks are held by one party and claimed by the other. The *Clarkes* hold these funds merely as administrators of *Ely Stott*; they, therefore, hold them expressly in trust for the persons who may be entitled to the possession of *Ely Stott's* assets; by the recall of their letters of administration, they necessarily become mere trustees for Mrs. *Dew*, who is now the sole personal representative of *Ely Stott*. It is true that by their answer they claim to retain the funds as their own; but their claim rests on a will which the competent tribunal has declared to be a nullity.

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The *Attorney-General* (Sir *Charles Wetherell*) and Mr. *Routell*, *contra*.

The act has always been considered to extend only to trustees holding upon trusts created by express declaration. In the present case, the alleged trust does not arise from any express declaration. In fact, the allegation of the Plaintiffs is, not that the *Clarkes* hold by a legal title, which is clothed with a trust for them, but that they hold without any legal title, the sole legal title being in Mrs. *Dew*. The parties, therefore, do not stand in the relation of trustee and *cestuis que trust*. The case stated is, that, on the one side, there is possession without legal title, while, on the other, there is a title both legal and equitable, without possession; and the object of the application is — not to unite the legal and equitable interests — but to annex the possession to the legal title.

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Though there can be no doubt as to the right of the petitioner to the fund, I cannot make any order upon this petition. Upon consideration, I am of opinion that the act must be confined to trusts created by express declaration. I am informed, that, in the bill, as it originally stood, there was a clause, which would have included constructive trusts, but Lord *Redesdale* objected to it strongly, and it was struck out. *

* See 1 *Wm. 4. c. 60.*

JACKSON v. ROWE.

April 22. 24.

To a bill, stating a settlement, under which, after a life estate limited to *A.*, the Plaintiff was entitled to certain hereditaments, and praying the delivery of the title-deeds, the Defendant put in a plea of purchase from *A.*, for valuable consideration, without notice, averring that *A.* pretended to be seised in fee, and was in possession, but not averring that he had any title prior to and independent of the settlement: *Quere*, Whether such a plea is a good defence to the bill.

A plea of purchase for valuable consideration without notice, must aver, that the vendor pretended to be seised, not merely before, but at the respective times of the execution of the conveyance, and of the payment of the consideration.

Semble. Leave will not be given to amend a plea, unless the Court is satisfied that the defect, which the amendment is intended to remedy, arose from an accidental slip.

THIS was an amended bill, filed by Mr. and Mrs. *Jackson* against *John Paul Rowe*. It stated, that, by indentures of lease and release, dated the 21st and 22d of *September* 1789, made and executed between and by *Richard Pope* and *Deborah* his wife of the one part, and *Treacher* and *Taylor* of the other part, and by virtue of a fine duly levied, certain hereditaments in *Middlesex* were limited to *Richard Pope* for life: remainder to his wife *Deborah* for life; remainder to the use of such one or more of the children of the marriage as *Richard* and *Deborah*, or the survivor, should appoint; that, by an indenture, dated in *July* 1799, made and executed by and

and between Mrs. *Pope*, described as the widow of *Richard Pope*, of the one part, and her daughter the Plaintiff, Mrs. *Jackson*, by her then name of *Deborah Pope*, of the other part, reciting that *Richard Pope* was dead without having exercised the power of appointment jointly vested in him and his wife, Mrs. *Pope*, in pursuance of her power, appointed the premises to her daughter *Deborah*; that this deed was duly registered; that Mrs. *Pope* intermarried with *John Rowe* in November 1801; that *Rowe* died in October 1816, having appointed *John Paul Rowe*, who was his heir at law, his executor; that the title-deeds of the premises were in *Rowe's* possession at the time of his decease, and that *John Paul Rowe*, as heir at law and devisee of his father, had obtained possession of these deeds, and, ever since his father's decease, had received the rents of the property; and that the Plaintiff's mother died in 1824, having appointed the Plaintiff *Deborah* her sole executrix. The bill further stated, that the Defendant pretended, that the Plaintiff's mother, at and before the time of her marriage with *John Rowe*, alleged, that she was seised in fee in possession of the tenements in question — that, in consideration of the marriage, it was agreed between her and him, that she should convey the fee-simple in possession of those tenements to him *Rowe*, his heirs and assigns — that this agreement was carried into effect, by indentures of lease and release, dated the 18th and 19th of November 1801, being the settlement made upon the marriage of the parties; and that the Defendant insisted that his said father was a *bonâ fide* purchaser of the premises for a good and valuable consideration, and had no notice of the indenture of the 22d of September 1789, or of the deed of appointment of the 11th of July 1799. The bill then denied the truth of these pretences; charging, that, before and at the time of the marriage, *John Rowe* had

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had due notice, or knew, or believed, or suspected, or had reason to know, believe, or suspect, that the Plaintiff's mother had executed the indenture of the 22d of September 1789, and the deed of appointment of the 11th of July 1799, "and, therefore, that she had ceased to have any interest whatever in the said estate and premises:" and some circumstances were stated as evidence of such notice. The prayer was, that the Defendant might account for the rents which had been received by his father or himself; and that he might be decreed to deliver up the title-deeds to the Plaintiff.

The Defendant demurred to so much of the bill as prayed relief or discovery with respect to the rents received in the lifetime of the mother: to the residue of the bill he put in a plea and an answer.

The plea was in the following form:—"And as to so much of the prayer of the said bill as extends to an account and payment of the rents, issues, and profits of the messuages, tenements, and premises in the bill mentioned, which have been received by or on behalf of the Defendant since the decease of *Deborah Rowe*, in the bill named, and as prays that the Defendant may be ordered to deliver over to the Plaintiffs, or as they shall direct or appoint, all deeds, papers, and writings in his possession, custody, or power, belonging, or in any manner relating, to the said messuages or tenements and premises, and that he may be restrained, by the order and injunction of this honourable Court, from further receiving any of the rents, issues, and profits of the said messuages, tenements, and premises; and that, if necessary, some proper person may be appointed to receive the same; and for general relief; and as to all the discovery sought by the said bill, except such parts thereof as
are

are before demurred to, and except as to so much of the said bill as seeks that the Defendant may discover and set forth, whether, at some, and what time before the marriage of *John Rowe* with the Plaintiff *Deborah*'s late mother, he, the said *John Rowe*, had not some and what notice, and whether he did not know, believe, or suspect, or had not some and what reason to know, believe, or suspect that the Plaintiff's late mother had executed the indenture of the 22d of *September* 1789, and the deed of appointment of the 11th of *July* 1799, or some, and which of such deeds, or some other, and what deed or instrument in writing, in some and what manner affecting, or intending or intended to affect or relate to the estate and premises in the bill mentioned, or some and what part thereof; and whether the said *John Rowe* had not, at some and what time in his possession, custody, or power the said indenture of the 22d of *September* 1789, and deed of appointment of the 11th of *July* 1799, or one and which of them, so far as such last-mentioned interrogatory extends to the time antecedent to the marriage of the said *John Rowe* and *Deborah* his late wife — this Defendant doth plead thereunto, and for plea saith, that he hath been informed and believes, that *Deborah Rowe* deceased, formerly *Deborah Pope*, widow, before the respective times of the execution of the indentures of lease and release, and the marriage with *John Rowe* hereinafter mentioned, alleged and pretended, that she was seised, in fee-simple in possession, of the messuages and tenements hereinafter mentioned, and that she was, at the respective times aforesaid, in the quiet possession or the receipt of the rents and profits of the same messuages and hereditaments; that, in the month of *November* 1801, a marriage was agreed upon between the said *Deborah Rowe*, then *Deborah Pope*, and the Defendant's late father, *John Rowe*, and that, in consideration thereof, *Deborah Rowe*, then *Deborah Pope*, agreed

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agreed to convey the fee-simple in possession of the said messuages and hereditaments to *John Rowe*, his heirs and assigns, in manner hereinafter mentioned; and that thereupon certain indentures of lease and release, dated the 18th and 19th of *November* 1801, were duly executed by the said *Deborah Rowe*, then *Deborah Pope*, and *John Rowe*." The plea next set forth the purport of the release, by which, after reciting that *Deborah Pope* was, by virtue of the last will of *Mary Franklin*, dated the 19th of *September* 1785, seised of or entitled to the messuages in question in fee-simple, they were conveyed to *John Rowe* in fee. The plea then averred, that the marriage was duly solemnized; that, at or before the respective times of the execution of the indentures of lease and release of the 18th and 19th days of *November* 1801, and of the solemnization of the marriage, *John Rowe* had no notice whatever of any estate, right, or title in the Plaintiff *Deborah Jackson*, which in anywise affected the said messuages and hereditaments, or any part thereof; and that before the marriage he had not any notice whatsoever, and that he did not know, believe, or suspect, and had not any reason, to know, believe, or suspect, that the Plaintiff's late mother had executed the indenture of the 22d of *September* 1789, and the deed of appointment of the 11th of *July* 1799, or either of such deeds, or any other deed or instrument in any manner affecting the premises in question, or any part thereof, except the deeds of the 18th and 19th of *November* 1801. The Defendant's title, as devisee under his father's will, was next shewn; and the plea concluded by insisting, that *John Rowe* was a *bonâ fide* purchaser of the hereditaments for a good and valuable consideration, and without notice.

The plea was supported by an answer.

On

On the 1st of *February* 1826, the Vice-Chancellor overruled the plea.

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The Defendant appealed.

Mr. *Sugden* and Mr. *Walker*, in support of the plea.

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In *Walwyn v. Lee* (a), the averments of the plea were merely that the Plaintiff's father, alleging himself to be seised in fee, and being in actual possession of the premises, conveyed them to the Defendant, who had no notice of the act of parliament under which the Plaintiff claimed: and that plea was sustained.* Lord *Eldon* in his judgment mentions only two propositions as necessary to a plea of purchase for valuable consideration without notice (b), viz. that the vendor was the owner or the pretended owner, and that he was in possession. In *Story v. Windsor* (c), Lord *Hardwicke* said, "Where you plead a purchase for a valuable consideration without notice of the Plaintiff's title, it is sufficient to aver, that the person,

(a) 9 *Ves.* 24.

(b) 9 *Ves.* 32.

(c) 2 *Atk.* 630.

* In the course of the argument before the Vice-Chancellor, His Honor distinguished the present case from *Walwyn v. Lee*. "In *Walwyn v. Lee*," observed His Honor, "it was apparent, on the face of the bill, that the father was tenant in fee before the execution of the settlement under which the plaintiff became tenant in tail: and, therefore, there was no occasion to introduce into the plea an averment to that effect. Lord *Eldon*, in his judgment, observes (a), that "the father was

in possession of documents which would prove him to be tenant in fee, if he dropped the settlement, and withheld the act of parliament;" so that it is clear that the pleadings in that cause shewed a title originally in the father, adverse to the settlement under which the plaintiff claimed. But here the bill does not set forth any title, originally in the mother, adverse to the title created by the settlement; and, therefore, if such prior title existed, it ought to have been pleaded."—MS. note.

(a) 9 *Ves.* 31.

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person, who conveyed, was seised, or pretended to be seised, at the time that he executed the purchase-deeds." The rule is expressed by Lord *Redesdale* (a) in these words: "Such a plea must aver, that the person, who conveyed or mortgaged to the Defendant, was seised in fee, or pretended to be seised, and was in possession, if the conveyance purported an immediate transfer of the possession, at the time when he executed the purchase or mortgage-deed." It is true, that in *Hughes v. Garth* (b) a plea of purchase for valuable consideration was overruled, because it did not state how the person, from whom the title was deduced, became entitled; but that decision proceeded on the ground, that the vendor was not in possession, and that he pretended to be seised of, and to convey, a reversion only. The principle of the decision of the Court below was, that a Defendant, who seeks to protect himself on the ground of his being a purchaser for valuable consideration without notice, must set forth in his plea some instrument under which the fee simple was vested in the person who sold: and for such a rule there is no authority. "It must be intended," said the Vice-Chancellor, "upon these pleadings that the title of the Plaintiff's mother to the estate in question depended wholly on this settlement." On the contrary, the fair result to be deduced from the pleadings is, that the estate was originally the property of the mother. The conveyance of 1801 recites, that the fee became vested in her under the will of *Mary Franklin*: and the voluntary settlement, under which the Plaintiff claims, was confirmed by a fine, which, considering the nature of the limitations, would have been unnecessary, if the fee had been in the husband. Besides, the bill itself charges that the mother had executed the settlement of

1789

(a) *Lord Redesdale on Pleading*, 275.

(b) 2 *Eden*, 168. *Ambler*, 421.

1789 and the appointment of 1799, and, *therefore*, had ceased to have any interest in the premises; the fair inference from which is, that the interest of the mother was not created by either of those instruments, but was anterior to them both. She was in possession: *Rowe* was not bound to inquire into her title, for he had no notice of any circumstance to put him on inquiry; and even if he had inquired, the fee, which she had before the execution of the deeds of 1789, would have given her an apparent right to convey.

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Mr. *Rose* and Mr. *Tennant*, against the plea.

It is impossible to find in these pleadings any averment that the mother had, or pretended to have, the fee of the property before the execution of the settlement of 1789: and it is contrary to every rule of pleading, to substitute for distinct averments such inferences and conjectures as the Defendant has called in to his aid. The simple question, therefore, is, whether a purchaser is to be protected against the rightful title, provided only he can say, "The vendor was in possession and pretended to be seised of the fee; I asked for no title-deeds; I made no inquiry as to title; but I paid my purchase-money and got the title-deeds, and entered into possession." If such a doctrine be held to be law, a person in wrongful possession, without any title or colour of title, has only to sell to a stranger who buys without inquiry; and the rights of the true owner, so far as the interposition of a court of equity is concerned, are destroyed. The plea of purchase for valuable consideration without notice is applicable only where the vendor was in possession under an apparent title, and the purchaser seeks to protect himself against a subsequent title which was suppressed or overlooked. It is to that state of circumstances, that the *dicta* on this subject, which are to be found in the books, have reference.

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Besides,

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Besides, the plea is, in other respects, defective in its frame. First, the allegation ought to have been, that the mother, *before and at* the respective times of her marriage with *Rowe*, and the execution of the indentures of *November* 1801, pretended to be seised in fee. The plea is only, that *before* these times, she pretended to be so seised: so that if she had, at any one time before 1800, represented herself to be seised in fee, and had never made any such representation at any other time, the plea would be strictly true. Secondly, there is no allegation that the husband, *Rowe*, believed, or that the Defendant believes that he believed, that she was seised in fee. *Carter v. Pritchard. (a)*

Mr. Sugden, in reply.

Neither in any of the treatises on pleadings, nor in those cases in which the subject of pleas of purchase for valuable consideration has been most elaborately discussed, is it suggested that such a plea ought to contain an averment, that the Defendant believed that the vendor was seised in fee. If such an averment be necessary in any case, it can only be where the purchaser himself is the Defendant. In the mouth of a third party claiming through him, it would be nugatory.

As to the other objections, the fair construction of the plea is, that the mother, before and at the time of her marriage with *Rowe*, pretended to be seised. The execution of the deeds of *November* 1801 constitutes of itself a representation by her that she was then seised. The Defendant and the Plaintiff both claim under her; the latter under a conveyance made for valuable consideration, the former, under a voluntary settlement: her seisin, or claim of seisin, therefore, is not a point in
issue

(a) Cited in *Sugden's Vend. and Purch.* 737. sixth edit.

issue between the parties; and the averments with respect to it might, in a case like this, be disregarded altogether.

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It is stated in the authorities, that the party relying upon a plea of purchase for valuable consideration without notice must aver that the vendor was seised, or pretended to be seised, and was in possession, at the time when he executed the conveyance. In this plea I find no such averments, nor any thing equivalent to them. The averment is, "that *Deborah Pope*, before (not before and at) the respective times of the execution of the indenture, and of her marriage with *Rowe*, alleged that she was seised." In the case from *Atkyns* (a), it is stated expressly that the averment must be, that the person who conveyed was seised, or pretended to be seised, at the time when he executed the deeds.

It was argued, that it was not necessary that the usual form of averment should be followed in this case, because the Plaintiff and Defendant claimed under the same person, the vendor. But no authority was cited in favour of such a distinction; and on principle it cannot be maintained. A plea of this kind must shew, that, if the vendor had not a good title, the party purchasing was imposed on at the time of the purchase.

On this single ground, and without entering into the consideration of the question decided by the Vice-Chancellor, I am of opinion that the plea must be overruled.

An

(a) 2 *Atk.* 630.

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An application was made for leave to amend the plea and the petition of appeal. It was stated, that, in the plea to the original bill, the averment was, that *Deborah Pope*, before and at the times of the execution of the indentures of November 1801, and of her marriage with *Rowe*, pretended that she was seised; and that the omission of the words "and at" was a mere slip.

June 7.

The LORD CHANCELLOR gave leave to amend the plea and petition of appeal in this respect; adding, that, if the Plaintiff required an affidavit that the omission had been merely accidental, and had not been the result of any instructions given by the Defendant or his solicitor, such an affidavit must be made.

An affidavit to that effect was accordingly made by the Defendant and his solicitor; and the Defendant further swore, that he believed that *Deborah Pope*, before and at the time of the conveyance to *Rowe*, and of her marriage, pretended to be seised in fee.

Before the order giving leave to amend was drawn up, an application was made with a view to enlarge the terms of the order, so as to enable the Defendant to introduce into the plea an averment of his belief conformable to the statement contained in the affidavit.

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July 6.

The LORD CHANCELLOR.

The rule of the Court, with respect to the amendment of pleas, is stated by Lord Eldon in *Wood v. Strickland*. (a) "In *Newman v. Walker*," says he, "Lord Thurlow thus states the rule; which is also given by Mr. Wyatt in his edition of the *Practical Register*.

(a) 2 Ves. & Bea. 157.

gister. ‘With respect to any amendment of the plea, though certainly there have been cases in which the Court has permitted pleas to be amended, where there has been an evident slip or mistake, and the material ground of defence seems to be sufficient, yet the Court always expects to be told precisely what the amendment is to be, and how the slip happened, before they allow the amendment to take place.’ Lord *Thurlow* repeats the same opinion afterwards in *The Nabob of Arcot v. The East India Company.*” (a) In the same case of *Wood v. Strickland* Lord *Eldon* said, “I shall not preclude the Defendant from making a motion explaining how the slip happened, and stating distinctly the intended amendments.” On these grounds I considered myself warranted in permitting an amendment of the plea, so that the averment should be, that the lady pretended, at the time of the execution of the conveyance to *Rowe*, and of her marriage with him, that she was seised: for the nature of the amendment was specified, and it was stated how the slip arose, and that statement was verified by the affidavit of the Defendant and his solicitor. But I do not think I should be justified in permitting any further amendment.

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(a) 3 Bro. C. C. 292. 300—310. 1 Ves. jun. 571.

1828.



1827.

Feb. 22.

1828.

March 24.

1829.

July 7.

PYCROFT v. GREGORY.

An unmarried woman, upwards of eighty years of age, devised lands to trustees and their heirs, upon trust for her kinsman, *W. S.*, during his life, and, after his decease, for his children then living in fee; and in case *W. S.* should die without leaving any such child, then upon trust to convey the lands to the next of kin of her late father and mother, *J. H.* and *T. H.*, both deceased, his or her heirs and assigns, and if more than one, in equal shares, and proportions. *J. H.* and *T. H.*

MARTHA HARDRESS, by her will dated the 28th of July 1792, devised gavelkind lands in *Kent* unto *John Gregory* and *Richard Coleman*, their heirs and assigns, upon trust for her kinsman *William Sammon* during his life; and from and after his decease, upon trust to assure and convey the same to the use of all and every the child and children of *William Sammon*, who should be then living, and the issue of such of them as should be then dead, and the heirs and assigns of such children and issue respectively. "And in case," continued the testatrix, "the said *William Sammon* shall depart this life without leaving any such child or children as aforesaid, then upon trust, and it is my will, that the said *John Gregory* and *Richard Coleman*, their heirs or assigns, shall and do, as soon as may be after the decease of the said *William Sammon* without leaving any such issue as aforesaid, convey and assure the said messuage and tenement, lands and hereditaments to the next of kin of my late father and mother, *John Hardress Esq.* and *Tomlinson Hardress* his wife, both deceased, his or her heirs or assigns for ever, and if more than one, in equal shares and proportions, and to take as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns for ever."

The were not related to each other, and, at the date of the will, they had no children, or descendants of children, except the testatrix herself; so that, at her death, there was no person who was of kin both to her father and to her mother: Held, that no person could take, under the ultimate devise over, unless he was next of kin both to the father and to the mother, and, there being no such person, that the property devolved to the testatrix's heir.

The testatrix was upwards of eighty years of age at the date of her will, and died on the 3d of *August* 1793. She had never been married. *William Sammon*, the tenant for life, was her heir at law, and heir by the custom of gavelkind. He died on the 3d of *October* 1813, without ever having had any child. He had been declared bankrupt in 1803.

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 v.
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The father and mother of the testatrix were not related to each other. They had had nine children, all of whom, except the testatrix, were dead without issue at the date of the will. There was not, at the date of the will, or subsequently, any person, other than the testatrix, who was next of kin both to *John Hardress* and to *Ann* his wife, (whose maiden name had been *Ann Tomlinson*, and who was called in the will *Tomlinson Hardress*,) and, consequently, after the testatrix's death, there was no person who was of kin to both.

There was not, at the date of the will, any next of kin of *John Hardress* or of his wife, other than the testatrix; but if she had been dead, *William Sammon* would then have been, and upon her death he became, the sole next of kin of *John Hardress*; and, on the death of *William Sammon*, there was no person who was of kin to *John Hardress*.

At the date of the will, *Charles Spence*, *Mary Spence* his wife, *Sarah Pycroft*, and *Henrietta Ford*, would have been the next of kin of *Ann Hardress*, had the testatrix been dead; and, upon her decease, they became the next of kin of *Ann Hardress*. *Charles Spence*, *Mary Spence*, and *Sarah Pycroft* died in the lifetime of *William Sammon*; and thus, at *William Sammon*'s death, *Henrietta Ford* was the sole next of kin of *Ann Hardress* then living.

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At the original hearing inquiries were directed; and the Master, having prosecuted these inquiries, made a report, by which the facts above mentioned were ascertained.

At the hearing on further directions, the question was, Who, in the events which happened, became entitled, on *William Sammon's* death, to the lands which were the subject of the devise?

The Plaintiffs, as representing the interest of *Sarah Pycroft*, one of the individuals who, at the testatrix's death, were the next of kin to her mother, but who died in the lifetime of *William Sammon*, insisted, that, upon the death of the testatrix, the estate, subject to the life interest of *William Sammon* and the contingent limitations to his children and their issue, vested in him, as the sole next of kin of the father, and in *Charles Spence*, *Mary Spence*, *Sarah Pycroft*, and *Henrietta Ford* as the next of kin of the mother; each of these persons taking one fifth part of the estate.

The Defendant, *Henrietta Ford*, concurred with the Plaintiffs in contending that the devise was meant to comprehend all persons who were next of kin either to the father or to the mother; but she submitted, that only the next of kin living at the death of the tenant for life, and not all who were next of kin at the death of the testatrix, were to take, and, therefore, that she alone was entitled to the lands.

The assignee of *William Sammon* contended, that no person could claim under this devise, who was not next of kin both to the father and to the mother; and, there being no person to answer that description, that the fee, subject to the prior estates, vested in *William Sammon*

as the testatrix's heir at law and heir by the custom of gavelkind.

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The case was argued at the Rolls before Sir J. S. Copley; but judgment was not pronounced till after he was appointed Lord Chancellor.

The LORD CHANCELLOR.

Martha Hardress devised certain real estates to *William Sammon* for life, and, after his decease, to such of his children as should be then living, and the issue of such of them as should be then dead; and the will went on to direct, that, in default of any children, "the trustees were to convey the said property to the next of kin of my late father and mother *John Hardress* Esq. and *Tomlinson Hardress* his wife, both deceased, his or her heirs or assigns for ever, and if more than one, then in equal shares and proportions, and to take as tenants in common and not as joint tenants, and to their several and respective heirs and assigns for ever."

It was contended, that these terms were equivocal, and two interpretations were suggested. On the one side it was contended, that the next of kin meant the persons who were next of kin of both the father and the mother of the testatrix: on the other side it was contended, that the next of kin of her late father and mother meant the next of kin of the father of the testatrix, and also the next of kin of her mother, and that both classes of next of kin were to take. For the purpose of supporting the latter construction, reference was made to the Master's report, in which it was found, that, at the date of the will, and at the time of the death of the testatrix, there was no person, except herself, to
answer

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answer the description of the next of kin both of her father and of her mother: but there was nothing to shew that she was apprized of this circumstance.

The terms of the will are these:—"To the next of kin of my late father and mother, both deceased, his or her heirs or assigns for ever." The phrase "his or her heirs and assigns for ever," shews that the testatrix contemplated that the next of kin might be one individual; for these are words applicable to one individual; and they are consistent with the construction, that the persons, who were to take, were to be the next of kin of both the father and mother, that is, descendants of the father and the mother (for the father and mother were not related to each other); but they are quite inconsistent with the supposition that the testatrix meant the next of the father and also the next of kin of the mother, the father and the mother not being at all related to each other.

It does not rest here. The testatrix goes on and provides for the other alternative—"And if more than one, in equal shares and proportions, and to take as tenants in common and not as joint tenants." So that she supposed that the next of kin of her father and mother might be either one person or more persons than one; and she has provided for both contingencies. It is therefore clear, as it appears to me, that she meant by the description of "the next of kin of my late father and mother," the next of kin of both her father and mother, that is, the descendants of the father and mother.

So strongly was this felt in the course of the argument, that it was contended, that the words "if more than one, then in equal shares and proportions," were
 words

words without meaning, which had been inserted by mistake, and ought to be rejected. The Court certainly cannot reject words of that description. We must give a meaning to all the words of the will, unless it becomes necessary to reject any particular expressions as inconsistent with the whole of the will. But these expressions, far from being, as it is argued, inconsistent with the whole of the clause, are quite consistent with the previous words — “to the next of kin of my late father and mother, both deceased, his or her heirs or assigns for ever.”

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I am of opinion, therefore, on the construction of this clause, that the testatrix meant to give the property to the descendants of her father and mother; and as there is no individual coming within that description, in follows, that the heir at law, or his assignees, who stand in his place, are entitled to have the lands conveyed to them.

A petition of re-hearing was presented.

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The *Solicitor-General* (Sir *E. B. Sugden*) and Mr. *Rayley*, for the Plaintiffs.

Mr. *Horne*, Mr. *Pepys*, and Mr. *Lee*, for Defendants in the same interest with the Plaintiffs.

Mr. *Boteler* and Mr. *Tinney*, for Mrs. *Ford*, who, as against the heir at law, had the same interest with the Plaintiffs.

The rule of law, it was argued, is, that, in construing a will, extrinsic circumstances may and often must be taken into consideration, in order to ascertain the true meaning

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ing of the testator. In *Lowe v. Lord Huntingtower* *, that point was much considered; and the Court of King's Bench held, that extrinsic circumstances relative to the ages

* *LOWE v. Lord HUNTINGTOWER.*

Collateral circumstances, relating to the ages of the several devisees, and to their being married or unmarried, admissible in evidence, for the purpose of ascertaining the true construction of a will.

Richard Lowe, by his last will, bearing date the 5th day of *February* 1781, devised his real estates, in the counties of *Derby, Bedford, Lincoln, Wilts, and Middlesex*, to *Edward Miller Mundy, Robert Williams*, and *Kempe Brydges*, for the uses therein after mentioned, and appointed them executors. He next directed the surplus of his personal estate, after payment of his debts and legacies, to be laid out in the purchase of lands in particular parishes. Then, after giving his daughter *Charlotte* a portion of 10,000*l.*, on condition that she married as therein mentioned, he continued thus — “But in case she should marry with her own consent any one of my three kinsmen *William Thomas* or *John Drury* her choice beginning with the eldest then *Thomas* and then *John* my will is that if any one of them takes place I will that which ever of them she chooses I give him all the *Danby* and *Locke* estates on taking the name of *Lowe*

and settling one annuity or rent charge of 1000*l.* a year during her life And in case the aforesaid circumstance should not take place with my daughter *Charlotte* I then will that it may be offered to my daughter *Ann Layton* otherwise *Lowe* in every particular and charge the aforesaid estates in *Bedfordshire Lincoln* and *Wilts* with the aforesaid 10,000*l.* on the special conditions aforesaid to either of them that shall not marry as aforesaid And should neither of the above marriages take place I will that one or any one of the sons of my executor *Edward Miller Mundy* and a liking should take place that on their taking the name of *Lowe* and making the same settlement the estates shall be theirs and their heirs male for ever. And whereas the above estates are at present charged with an annuity of 1000*l.* during the life of my brother's widow *Mrs. Sydney Lowe* I will that the income of the remainder of my fortune shall be the property of the

ages of the devisees, and their condition as to being single or married, were admissible in evidence for the purpose of aiding the construction of an obscure will.

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the person who marries either of my aforesaid daughters and his heirs for ever taking taking the name of *Lowe* and that the intail be continued on all my fortune not to be disposed of or mortgaged but for the sole use of the income only to the name of *Lowe* for ever And should it so happen that neither of my aforesaid daughters should marry in the manner I have mentioned or to some worthy good man of an estate in fee of not less than 500*l.* in land or real property unincumbered of 10,000*l.* I will that my said daughters have 10,000*l.* each to be paid by my executors at such time as they or any two of them think proper and then I give all my estates both landed and personal to my kinsman *William Drury* and his heirs male for ever on his and his heirs taking the name of *Lowe* irrevocably."

After the date of the will, the daughter *Charlotte* married *William Heath*, and received a marriage portion. Her father subsequently made a codicil, dated the 25th of *May* 1785, by which, after revoking the appoint-

ment of *Robert Williams* and *Kempe Brydges* to be trustees and executors, he "devised and bequeathed unto *Edward Miller Mundy John Radford* and *Evan Lewis* and their heirs all his real and personal estates in the counties of *Derby Bedford Lincoln Wilts* and *Middlesex* to hold to them and their heirs to the use of such person and upon such events and under such conditions and subject to such charges as are mentioned and declared in and by his said last will and testament." He then proceeded to revoke all the devises and bequests, contained in his will, for the benefit of his daughter *Charlotte*, and declared void all claim and right which her husband *William Heath*, might have under it. "And," continued he, "in case my other daughter *Ann Lowe* otherwise *Layton* should marry either of the gentlemen and in the manner mentioned in my said will then and in such case and upon this express condition that either of those gentlemen whom she may so marry and his heirs will accept take and use the name of

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In *Jones v. Morgan* (a), *Driver v. Frank* (b), *Cholmondeley v. Clinton* (c), *Wilkinson v. Adam* (d), *Hampshire v. Pierce* (e), circumstances, extrinsic to a written instrument,

(a) *Appendix to Fearn's Contingent Remainders*, Butler's ed.
 (b) 5 M. & S. 29.

(c) 2 Mer. 81. and 2 Jac. & W. 116.
 (d) 1 Ves. & B. 422.
 (e) 2 Ves. sen. 217.

of *Lowe* only I give all my real and personal estates subject to my debts funeral expenses and legacies and also subject to a rent-charge of 1000*l.* per annum to my said daughter *Ann Lowe* otherwise *Layton* for her life and independent of her husband unto such of those gentlemen whom she may so marry and his heirs And in case my said daughter *Ann Lowe* otherwise *Layton* shall not choose to marry either of those gentleman who I have mentioned in my will for that purpose or if she does marry one of them and he should refuse to accept take and use the name of *Lowe* then and in such case I do hereby revoke all devises and bequests contained in my said will and this my codicil to my said daughter *Ann Lowe* otherwise *Layton* and in lieu thereof I give and devise unto her 10,000*l.* to be paid to her at her age of twenty-one years or day of marriage which should first happen and in the meantime and until

the said 10,000*l.* shall become payable I direct my executors to pay unto my said daughter *Ann Lowe* otherwise *Layton* 3*l.* per cent. per annum for the same and I hereby charge my real and personal estates with the payment of the said 10,000*l.* and the interest thereof as aforesaid And in all respects subject and conformable to this my codicil I do confirm my last will and testament."

Richard Lowe died shortly after the date of the codicil. The daughter *Ann* attained her age in 1788; and in 1789 she married Mr. *Fane*, who had not an estate in fee of not less than 500*l.* in land, or real property unencumbered of 10,000*l.* Mrs. *Fane's* legacy of 10,000*l.* was paid out of the personal assets of her father; and the Plaintiff *William Drury* assumed the name of *Lowe*, entered into possession of the real estates of the testator, and suffered a recovery to the use of himself in fee. He

ment, were taken into consideration for the purpose of ascertaining the intention of the parties and construing the words accordingly.

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He afterwards contracted to sell a part of the estate to Lord *Huntingtower*, and filed his bill against him for specific performance.

The question in the cause was, whether the vendor had an indefeasible estate in fee simple; and that depended on the question, whether the daughter *Ann*, in the event of the death of her husband *Mr. Fane*, and of her marrying one of the persons specified in the will, might not become entitled to the property.

William and *Charlotte Heath*, *Thomas* and *Ann Fane*, *William*, *Thomas*, and *John Drury*, and several of the sons of *Edward Miller Mundy* were still living.

The Vice-Chancellor directed a case for the opinion of the Court of King's Bench. That case stated the material parts of the will and codicil of the testator, and the facts above mentioned; and upon this case*, the Judges certified that the Plaintiff was seised of an indefeasible estate in

fee simple in the lands in question.

The cause came on before Lord *Eldon* on the 1st of *November* 1822, who ordered that the case should be amended by introducing the statement of certain facts; and that the case, when so amended, should be referred back to the Judges for their opinion on the following questions:

"Whether the facts thereby ordered to be introduced in the said case were admissible as evidence in the said case:

"And, if so, whether, on the case, so amended as aforesaid, they were of the same opinion as before certified by them, or how otherwise."

The facts thus introduced into the case were the following.

"At the date of the will, the Plaintiff (in the will named by the name of *William Drury*) was a bachelor; *Ann Layton*, otherwise *Lowe*, had attained the age of fourteen years; and *Edward Miller Mundy*,

* The argument of the case is reported under the name of *Lowe v. Manners*, in 5 *Barn. & Ald.* 917.

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In *Wilde's* case (a) it was resolved, that, where there is a devise to *A.* and his children, or to *A.* and his issue, the devisee takes an estate tail, if he has no issue at the time

(a) 6 Rep. 17.

Mundy, (in the will named) had five sons, namely, *Edward Miller Mundy* the younger, aged seven years, *Godfrey Basil Meynell Mundy*, aged six, *George Mundy*, aged four, *Frederick Mundy*, aged three, and *Henry Mundy*, aged two years or thereabout."

"At the date of the codicil, the Plaintiff was a married man, and all the said sons of *Edward Miller Mundy* the elder were living, and bachelors."

"At the time when the said *Ann Lowe*, otherwise *Layton*, attained the age of twenty-one years, and at the time of her said marriage, the Plaintiff was a married man."

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The case thus amended was argued by Mr. *Tindal* for the Plaintiff, and by Mr. *Haslewood* for the Defendant.

Mr. *Haslewood** contended that, though, upon the words of the will and codicil taken

by themselves, it might be doubtful whether the devise to *William Drury* was to take effect on the payment of the legacy to the daughter, or was to remain in contingency till there could be no such husband of the daughter as was described in the will, yet the collateral circumstances, stated in the case, were admissible in evidence, in order to ascertain the true meaning of the testator, and that they demonstrated that the latter construction was the only one which was conformable to his real intention.

At the date of the will, he argued, the testator's younger daughter had attained the age of fourteen years; and Mr. *Miller Mundy* had five sons, the eldest of whom was seven, and the youngest, two, years of age. Now, the intention of the testator was clear to this extent, that every one of these boys was to have a chance of obtaining the property by becoming the husband of his daughter.

* The very elaborate argument of Mr. *Haslewood* in this case was published in 1827.

time of the devise, but if he hath issue, he and his issue have but a joint estate for life; so that the circumstances of the family of the devisee were not only admitted by the

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ter. But seven years would elapse before the eldest would be marriageable by law, and twice seven years, before he would be marriageable according to the customs of *English* society. Is it probable, that the testator intended his daughter to wait seven years, or twice seven years, for the eldest son of Mr. *Miller Mundy*, or thrice seven years for his youngest son, before receiving the portion designed for her? Interest was not given in the mean time. Yet, if the legacy were sooner paid, all the sons of Mr. *Miller Mundy*, as well as the younger brother of the Plaintiff, would, according to the interpretation on which the Plaintiff insisted, be shut out from any opportunity of contracting marriage with the testator's daughter and obtaining the benefits annexed to such marriage. Was it not much more probable, that the payment of the legacies was to be without prejudice to the conditional devise, in favour of a *Drury* or a *Mundy*?

If this construction were

probable on comparing collateral circumstances with the contents of the *will*, it seemed to be *certain* on comparing them with the contents of the *codicil*. The 10,000*l.* was there made payable to the testator's daughter, on her attaining the age of twenty-one years. At that period of time, at the latest, the estate of the Plaintiff was to vest and become indefeasible, according to the construction for which he contended. But the eldest son of Mr. *Miller Mundy* would then be fourteen, and the youngest, nine, years old: only one of his sons would be marriageable in law, and not one of them would be marriageable in fact. The devise to any one of Mr. *Mundy's* sons who should marry the testator's daughter, was, therefore, utterly inconsistent and irreconcilable with a notion, that the devise to the Plaintiff was to take effect on payment of the legacy to the testator's daughter. And, if so, the right interpretation of the devise to the Plaintiff must be, — that it was to take

effect

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the Court as fit to be received in evidence, but actually formed the ground of the decision to which they came. Under a bequest to the children of *A.*, *prima facie* only children of *A.* are meant; if, however, there be no children of *A.* living, grandchildren may take. (a) In like manner, illegitimate children may take under the denomination of "children of *A.*," if he has no legitimate children; but they will not take by that description along with legitimate children of *A.* *Cartwright v. Vawdry.* (b) Lord *Woodhouselee v. Dalrymple.* (c) In the latter case Sir *William Grant* adverted particularly to the circumstance, that the testator was acquainted with the state of the family of the legatees at the time of making his will. There is also a numerous class of cases, in which the Court, in order to determine what should pass by the words of a devise or bequest, has admitted evidence as to the state of a testator's property. *Day v. Trig.* (d)

In *Goodinge v. Goodinge* (e), Lord *Hardwicke* said, "Although parol evidence cannot be read to prove instructions of the testator, after the will is reduced into writing, or declarations whom he meant by the written words of the will: yet that is different from reading it to prove, that the testator knew he had such relations: to

(a) The cases on this subject are collected in *Roper on Legacies*, 60—67. 3d edition.
 (b) 2 *Mer.* 419.

(c) 5 *Ves.* 530.
 (d) 1 *P. Wms.* 287.
 (e) 1 *Ves. sen.* 232.

effect on the failure of a primary devise to a particular husband of the daughter.

The four Judges of the Court of King's Bench certified as follows: —

"We are of opinion, that

the facts ordered to be introduced into the said case are admissible in evidence in the said case. And, on the case so amended, we are of the opinion before certified."

to establish which fact it may be read; but not to go any further." In *Leigh v. Leigh* (a), one point in contest was, with which of two objects the testator had given a particular direction in his will; and Mr. Justice *Lawrence* says, "In order to ascertain whether the first of these two objects was that which the testator had in view, the situation and circumstances of his family at the time of making his will have great weight. He does not appear to have had any very near relations but his two sisters; for how near a cousin Mrs. *Craven* was does not appear; one of his sisters was single; and the other married to a gentleman of the name of *Hackett*." And, in putting a construction on the will, the learned Judge reasons on those circumstances.

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In *Colpoys v. Colpoys* (b), Sir *Thomas Plumer* says, "I hope it will not be supposed that I dissent from the case of *Fonnereau v. Poyntz*; nor that I agree that parol evidence is never to be let in, except in cases where there is a latent ambiguity. The admission of extrinsic circumstances to govern the construction of a written instrument, is in all cases an exception to the general rule of law, which excludes every thing *dehors* the instrument. It is only from necessity, and then with great jealousy and caution, that courts either of law or equity will suffer this rule to be departed from. It must be the case of an ambiguity which cannot otherwise be removed, and which may by these means be clearly and satisfactorily explained. This is always permitted in the case of a latent ambiguity, which not appearing on the face of the instrument, but arising entirely from extrinsic circumstances, may always be removed by a reference to extrinsic circumstances.

In

(a) 15 *Ves.* 92.

(b) *Jac.* 463.

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Gargony.

In the case of a patent ambiguity, that is, one appearing on the face of the instrument, as a general rule a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many cases this is impracticable; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity can be removed: if in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz. the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of *England* (which are seldom at variance), warrant the departure from the general rule, and call in the light of extrinsic evidence. When the person or thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument."

In the case of *Smith v. Doe dem. Jersey*, Mr. Justice Bayley says, "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard
to

to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression." (a)

1828.
PICKFORD
v.
GREGORY.

In *Jeacock v. Falkener* (b), Lord *Thurlow* says, "Evidence cannot be read to prove what the testator meant by the words used in his will, but it may as to facts upon which the testator made his will."

The father and mother of this testatrix were not related to each other; so that no person could be next of kin to both, unless he were a lineal descendant from them; and as they were both dead, and the testatrix was the only remaining descendant of their bodies, they could have no descendant except issue of her body. But she had never been married, and was upwards of eighty years of age: and yet, according to the judgment which has been pronounced, the devise over, on the failure of issue of *William Sammon*, was intended for the benefit of a class of persons, in which, under the actual circumstances of the family, only the issue of her own body could have been comprized. Such an intention is so improbable and irrational, that the Court would not impute it to a testatrix, unless the words of the will were so plain and express as not to admit of any other fair construction.

But, looking at the mere words of devise, the construction, for which we contend, is, to say the least, as natural as that which the decree has put upon them. A bequest to the next of kin of *A. B.* and *C. D.* would, according to the obvious import of the words, include the

(a) 2 *Brod. & Bing.* 553.

(b) 1 *Bro. C. C.* 296.

1828.
 PYCAOFF
 v.
 GREGORY.

the next of kin of *A. B.* and also the next of kin of *C. D.*: is there any reason why it should be confined to persons who are next of kin to both, if *A. B.* and *C. D.*, not being related in consanguinity, happen to be husband and wife? It is very improbable that the testatrix should have intended to postpone the lineal descendants of her father and mother, the issue of her own body, to her remote and collateral kinsman *William Sammon*. He was her nearest relation on her father's side: she, therefore, gave the property to him and his children; and if he had no issue to take at his death, her intention was, that her nearest relations, whoever they were, and whether their consanguinity was derived from the father's side or from the mother's side, should succeed to the estate. Thus, when we look at the circumstances of the testatrix's family, it is scarcely possible to doubt, that by "the next of kin of her late father and mother" the testatrix must have meant the next of kin of her father and the next of kin of her mother.

It was argued that the testatrix has used terms which shew that the next of kin, whom she contemplated, might be only one person; and, therefore, it is said, she could not have meant the next of kin to either of two persons who were not related to each other. As she has given to a class by words of general description, it cannot be denied, that, if there had been only one individual answering to the description, that individual would have taken the whole property. *Doe v. Sheffield.* (a) There might be only one person who was next of kin either to her father or to her mother; or there might be more than one so related to her; and if she has used words referable to either of these contingencies, she has done only what it was fit and natural for her to do in acting upon

(a) 13 *East*, 526.

upon the intention we ascribe to her. Even if she had introduced a formal clause, providing expressly for the two events of there being only one person, or of there being more than one person, answering to the description of next of kin, she would have done nothing more than is invariably done by conveyancers, when the gift is to a class.

1828.

 PYCROFT
 v.
 GARGORY.

Roe v. Quartley (a) has no application to the present case. There the devise was to the right heirs of *Walter Read* and *Mary* his wife; and it was held that a child of both was the person to take under that description. But there the husband and wife were alive; so that there was a probability of issue: they had a daughter who was mentioned in the testamentary instrument; and the wife was spoken of as being *enceinte* at the time. Accordingly the judgment of the Court proceeded on the ground, that the intention of the testator was to confine his bounty to the children of *Walter Read* and his wife.

Mr. *Preston* and Mr. *Pemberton*, for the assignees of the heir at law.

It must be conceded to us, that a devise to the heirs of *A.* and *B.*, being husband and wife, or to the heirs of the body of *A.* and *B.*, being husband and wife, would be a devise to a person who was heir of both, that is, to issue. *Roe v. Quartley*. (a) So a devise to the children of *A.* and *B.*, being husband and wife, would be a devise to persons who were children of both; and if there were children by a former marriage of *A.*, and also children by a former marriage of *B.*, neither of these classes of children would take, but those only who were children of both
A. and

(a) 1 T. R. 650.

1828.
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 PYCHOFF
 v.
 GANCOAT.

A. and B. On what principle is a different construction to be adopted in the case of a devise to the next of kin of husband and wife? The words, in their natural construction, denote persons who are next of kin of both; and there may be persons who answer the whole of the description. Why, then, should it be construed to mean persons who answer only one half of the description, being next of kin — not of the husband and wife, — but of the husband alone, and not of the wife, — or of the wife alone, and not of the husband.

The words, which follow, strongly confirm this construction. The testatrix does not direct the property to be sold and the purchase-money distributed, nor does it seem to have occurred to her, that the lands would necessarily be parcelled out among a number of persons. The estate is to be conveyed in one mass to the next of kin, his or her heirs and assigns. It is evident, therefore, that the event, which the testatrix contemplated as most probable, and which she provides for in the first place, was, that the devise would operate for the benefit of a single individual. If she had had in view two classes of next of kin, — next of kin of her father and next of kin of her mother, — the event, which, as most likely to happen, would have been first present to her mind, would have been, that there would be persons of both classes to take.

The testatrix has already directed, that the next of kin, of whom she speaks, if there should be more than one, are to take the property in equal shares. Now there was every probability that the next of kin of the father and the next of kin of the mother would not be in the same degree of relationship to the father and mother respectively, and that the two classes would not consist of the same number of individuals. One person
 in

in a near degree of relationship might be sole next of kin of the father; the next of kin of the mother might consist of a dozen persons very distantly related to her: then, according to the construction contended for on the other side, the next of kin of the father would have taken one thirteenth of the property, while the other twelve thirteenths would have gone to the next of kin of the mother. Such an intention cannot reasonably be imputed to the testatrix. If she had meant to extend her bounty to each of the two sources of blood, she would have given one half to the next of kin of her father and the other half to the next of kin of her mother. The words, which she has used, do not at all accord with such a scheme. On the other hand, according to the construction for which we contend, if the next of kin consisted of more persons than one, all those persons would necessarily be in the same degree of relationship to the testatrix's father and mother; and, therefore, nothing could be more natural, than that they should all take *per capita* in equal shares.

1828.

 PRICHARD
 v.
 GARGERY.

Suppose that there had been persons who were the next of kin of both the father and the mother in a more remote degree, and also persons who were next of kin of each in a nearer degree; it cannot be contended, that the former would not have taken to the exclusion of the other two classes. That is decisive with respect to the construction of the devise: and the words cannot receive a different meaning, on account of the accidental circumstance that there is no person who is next of kin to both. In order to vary the construction, recourse is had to parol evidence. But, in the first place, that evidence is not admissible. Where the description of the legatee, or of the subject bequeathed, applies to more persons than one, or applies completely to none but partially to several, the ambiguity, being raised by extrinsic circumstances, is permitted

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 v.
 GREGORY.

mitted to be removed by evidence of extrinsic circumstances. Lord *Cheney's* case (a), *Hampshire v. Peirce* (b), *Thomas v. Thomas* (c), *Oxenden v. Chichester*. (d) Such cases have no resemblance to the present: for here there is no latent ambiguity; whatever doubt may exist, that doubt arises upon the will itself, and is not created by extrinsic circumstances. Could it be contended that declarations of this testatrix at the time of making her will would be admissible, in order to ascertain whom she meant by "the next of kin of her father and mother?" In *Colpoys v. Colpoys* it was apparent, upon the face of the will itself, that the testator had in some clauses used the term "long annuities" in a sense different from that which it naturally bore; and the Court, therefore, looked at extrinsic circumstances, in order to ascertain what was the meaning in which he meant it to be understood. In order to apply that authority to the present case, it must be shewn that there are words in this will, which render it manifest that the testatrix did not mean "the next of kin of my late father and mother" to be understood in their natural import.

Secondly, it would serve no end to shew what were the actual circumstances of the testatrix's family, unless it could be proved that those circumstances were known to the testatrix: and *Holmes v. Cunstance* (e) and *Del Mare v. Rebello* (g) prove, that it is not to be assumed that a testatrix is acquainted with the circumstances of the persons to whom she has bequeathed her property.

Even looking at the circumstances, which, it is contended, ought to be received in evidence, how does it appear

(a) 5 Rep. 658.
 (b) 2 Ves. sen. 216.
 (c) 6 T. R. 671.

(d) 5 Taunt. 147. 4 Dow, 65.
 (e) 12 Ves. 279.
 (g) 5 Bro. C. C. 450.

pear that there could be no person who would be next of kin of both the father and the mother? In contemplation of law, there might be issue of the testatrix herself, notwithstanding her advanced age. Suppose that the will had been made by a man; he, physically as well as legally, might have had issue; so that, in that state of circumstances, the argument of the Plaintiffs would have failed in *toto*. Is, then, a will to receive one construction or another, according as it is made by a man or a woman? This testatrix had had seven or eight brothers and sisters; they might have been scattered all over the world; and though at the end of thirty-three years after the death of the testatrix, and upwards of 110 years from the time of her birth, no person has come in before the Master to claim to be descended from *John Hardress* and *Ann Hardress*, such descendants may, in point of fact, exist. The father and mother may have been related; and it is not to be inferred that there was no such relationship, merely because, at this distance of time, the Master is not able to trace out to any extent the pedigree of two persons who intermarried more than 110 years ago. At all events, it is unreasonable (even if the law would permit the inference) to impute to the testatrix a knowledge of the facts, which the Master has found, and of the inferences which he has drawn. She may never have known them; or she may have forgotten them; and a reference to inquire whether they were present to her mind, at the time when she made her will, would be a species of investigation for which no precedent could be found. The testatrix, in the will itself, has mistaken the name of her mother: if she did not recollect her mother's name, is it likely that she knew or recollected whether her mother and her father were related?

Sir *Charles Wetherell* and Mr. *Wheatley* appeared for the widow of the heir at law, though she was not a party to the suit.

The

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PYCROFT
 v
 GREGORY.

The Solicitor-General in reply.

The cases of latent ambiguities depend on a principle altogether different from that on which we rest our case. Our proposition is, that the circumstances of the family of the testatrix, at the time when she made her will, may be, and ought to be, looked at, in order that, in reading her will, we may give the words which she has used the meaning she intended them to bear; and that proposition is fully established by *Lowe v. Lord Huntingtower* and the other authorities which have been cited. In fact there could be no greater absurdity than to suppose, that the true construction of a will can be ascertained without any knowledge of the circumstances in which the person who made it, the person in whose favour it was made, and the property to which it relates, were placed at the time.

It must be presumed that the testatrix knew the state of her own family; and the evidence, on which the Master founded his report, shews, that she could not have been ignorant of it. Of her brothers and sisters, the greater number died in infancy; of the others, two were females, who both died unmarried; and the remaining one was a brother, who died without issue at the age of twenty-seven, and was buried at *Canterbury*, in the neighbourhood where the testatrix resided. There is no ground for suggesting that the members of the family were dispersed, so as to lose sight of each other.

Where there is a gift to the heirs of a husband and wife, the expression denotes the heirs of both; because there may be a person who will unite in himself the character of heir of both. But a gift to the heirs of a man and his sister will be construed to mean the heirs of each, because they cannot have issue of their bodies.

Now

Now here, though it appears on the face of the will that the relation of marriage had existed between *John Hardress* and *Ann Hardress*, yet it also appears that that relation had ceased by death; there existed no person, who, at the death of the testatrix, would answer the description of next of kin of both; and no such person could possibly come into *esse*. The gift, therefore, must be construed distributively, so as to mean the next of kin of each.

1828.
Pycroft
v.
Gregory.

The LORD CHANCELLOR adhered to his former judgment, and dismissed the petition of rehearing.

1830.
April 26.

Ultimately the parties entered into a compromise.

1828.

ROLLS.

1827.

July.

1828.

March 31.

French stock, the property of the bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, who had a general power of appointment over monies standing in the name of trustees in the English funds, made a will, by which she exercised that power, and died in her husband's lifetime; one of the three sisters, who was also an appointee and residuary legatee, and usually resided in France, took out administration to her, with the will annexed. An injunction was granted, at the suit of the assignee of the bankrupt, to restrain the trustees from transferring any of the stocks in the English funds over which the deceased wife's power of appointment extended.

STEAD v. CLAY.

THE bill was filed by *Stead*, as sole assignee under a commission of bankrupt, which, on the 26th of June 1823, was issued against *William Liddard*. According to the case stated by the Plaintiff, *Liddard*, in July 1822 being in insolvent circumstances, and having committed an act of bankruptcy, sold his property in England, and remitted the proceeds to Paris, where the money was invested in the purchase of 2145 francs of *French rentes*, either in his own name or in the joint names of himself and his wife. The dividends of this stock was paid to *Liddard's* bankers to the credit of his account. Out of these dividends a further sum was in like manner invested in the purchase of an additional *rente* of 155 francs; and, in February 1824, he caused the whole of this stock to be transferred into his wife's name, and she afterwards transferred it to her three sisters, of whom *Susannah Clay* was one.

Mrs. *Liddard*, who, in the event of there being no children of the marriage, had a power of appointing by deed or will 1500*l.* 3 per cent. Consolidated Bank Annuities, 59*l.* Long Annuities, and 1000*l.* 3 per cent. Reduced Bank Annuities, all standing in the name of trustees, made a will and codicil, by which she disposed of these funds, and gave the residue of her estate and effects to her sister Mrs. *Clay*, and appointed executors. In January 1825, she died without having had any children; and, the executors having declined to

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prove, Mrs. *Clay*, who, along with her other two sisters, had obtained possession of the *French* stock, took out letters of administration with the will annexed. Shortly afterwards *William Liddard* died.

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v.
CLAY.

The prayer was, that an account might be taken of the monies or effects, the property of the bankrupt, invested by him in the name of his wife, or possessed by her at the time of her death, or by Mrs. *Clay*; that the Plaintiff might be paid or might retain the amount out of Mrs. *Liddard's* assets; that the usual accounts of those assets might be taken; and that the trustees of the three sums in the *English* funds might be restrained from paying or transferring the stock or the dividends.

The 1500*l.* 3 per cent. stock was a sum, which the father of Mrs. *Liddard*, by a deed dated the 25th of *January* 1821, settled upon trust for her separate use during her life; remainder to her husband during his life; and after the decease of both of them, upon trust for such persons as she should by deed or will appoint; and in default of appointment, for her executors or administrators as part of her personal estate.

From the answers it appeared, that the power of *Susannah Liddard* over the 59*l.* Long Annuities, and the 1000*l.* 3 per cent. reduced stock, arose under an indenture dated the 12th of *August* 1813, being the settlement made on her marriage with *Liddard*, whereby it was witnessed, that the trustees were to stand possessed of this sum of stock, in trust, after the marriage, for the separate use of *Susannah Liddard* during her life; and after her decease, for the children of the marriage; but if there should be no such child or children, then for such persons as she should by deed or will appoint; and in default of appointment, for such persons as should be her next of kin, and would

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have

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have been entitled to her property, by virtue of the statute of distributions, if she had died intestate and unmarried. This settlement comprised, also, a quantity of plate, which belonged to Mrs. *Liddard*; and it contained a covenant on the part of the husband, that he would convey and assure any property, real or personal, which might afterwards come to or be vested in his wife, or in him in her right, upon trust for the separate use of the wife, and to be subject to such disposition as she by deed or will should make.

About 1821, Mrs. *Liddard*'s father died; when she became entitled to one fourth of his residuary estate, and shortly afterwards, her share, amounting to 1338*l.* 5*s.* 9*d.*, was received by her and her husband.

Susannah Clay by her answer suggested, but without positively affirming, that the *French rentes* had been partly purchased with this money, which, she insisted, was bound by the trusts of marriage settlement; and she submitted, that the *rentes*, so far as they had been purchased with it, were in like manner bound by the same trusts. She admitted, that *Sarah Liddard* had shortly before her death transferred to her, *Susannah*, and to her two sisters, 2300 francs of *French rentes*, which were still standing in their names; but she could give no account of the mode in which Mrs. *Liddard* had become possessed of the stock. She denied all knowledge and belief as to any of the circumstances which were stated in the bill with a view to shew that the stock had belonged originally to the bankrupt: and she insisted that the commission was invalid; stating, that no creditor had proved under it, and that, *Liddard* having petitioned that it might be superseded, Lord *Eldon* had directed a special case for the opinion of a court of law, which the death of *Liddard*

dard had prevented from being argued. * She admitted, that she and her sisters resided usually in *France*; and she assigned Mrs. *Liddard's* anxiety to be near the rest of her family as the only reason which induced Mr. *Liddard*, in 1822, to take up his abode in that country.

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CLAY.

The Plaintiff moved before the Vice-Chancellor for an injunction to restrain the transfer of the 59*l.* Long Annuities, and the 1000*l.* and 1500*l.* 3 per cent. stock.

His Honor granted the injunction as to the 1500*l.*, and refused it as to the other two sums†.

The Plaintiff now moved before the Lord Chancellor, that the injunction might be extended to the 59*l.* Long Annuities and to the 1000*l.* 3 per cent. stock: and the Defendants on the other hand, moved, that the injunction granted by the Vice-Chancellor might be dissolved.

Mr. *Sugden*, Mr. *Rose*, and Mr. *Knight*, for the Plaintiff.

The bill alleges, and the Defendants do not venture to deny, that the *French* stock, which was transferred into Mrs. *Liddard's* name, was the property of the bankrupt. The Plaintiff, therefore, has a right to recover possession of the stock from the personal representatives of *Sarah Liddard*; in other words, he has a demand against *Sarah Liddard*, for which her assets will be responsible: and, consequently, he has a right to the interposition of this Court, in order to prevent her assets from being removed out of the jurisdiction. These three
sums

* *Ex parte Stead*, in the *Matter of Liddard*, 1 *Gl. & J.* 301.

† 1 *Simons*, 294.

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sums are, for this purpose, assets of *Sarah Liddard* ; for it is the settled doctrine of courts of equity, that, where a person has a general power of appointment, and exercises that power, the fund so appointed is liable to answer the demands of his creditors ; and till these demands are satisfied, the appointees can take nothing.* If the *English* stock be permitted to be transferred to the Defendants, the Plaintiff will be left without remedy.

Mr. *Shadwell* and Mr. *Ching*, *contrâ*.

About and shortly before the time when the *French* stock was purchased, a large sum was received in respect of Mrs. *Liddard*'s share of her father's residuary estate, which her husband, according to the trusts of the settlement, was bound to leave at the wife's absolute disposal ; and the probability is, that the *French* stock was purchased with that money and with the proceeds of the sale of Mrs. *Liddard*'s plate. The basis of the Plaintiff's claim is merely conjectural.

But even if it be assumed that the *French* stock belonged to the bankrupt, the only relief, to which the Plaintiff could be entitled, would be to have the Defendants, in whose name the stock is standing, declared trustees for him. His interest in the *French* stock cannot give him a lien on the *English* stock. In what sense can he describe himself as a creditor of Mrs. *Liddard* ? During these alleged transactions, she was a married woman ; and if the property was unfairly transferred into her possession, she could not thereby incur a general liability ; and the assignee of the husband would not acquire any rights against her separate property.†

The

* See *Sugden on Powers* 556. † *Field v. Soule*, 4 *Russell*, 112.

The LORD CHANCELLOR.

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CLAY.

March 31.

A person of the name of *William Liddard*, who is stated to have carried on trade here, and to have been subject to the bankrupt laws, sold, it is alleged, in the year 1822, his household furniture, and all his property in this country, the produce of which was between 1700*l.* and 1800*l.* That money was invested, through the agency of *Rothschild* and Co., in the *French* funds, and *Liddard* afterwards went to reside in *Paris*. In the following year, a commission of bankrupt issued against him in *England*. Some time after the commission of bankrupt had issued, and after the appointment of assignees, he transferred the *French* stock to his wife *Sarah Liddard*. *Sarah Liddard* afterwards died, and she, previously to her death, as it is admitted in the answer, transferred this property to her sisters, of whom *Susannah Clay* was one. If this statement be correct, the stock so transferred was the property of the assignee; and the present bill is filed by the assignee of *Liddard* against *Susannah Clay* and other persons interested in this fund, or supposed to be interested in it.

Sarah Liddard had, under a settlement, executed by her father in the year 1821, an absolute power of disposition over a sum of money in this country in the funds — 1500*l.* 3 per cents. She also, under her marriage settlement, executed in 1813, had an absolute power of disposing of 59*l.* Long Annuities, and of another sum of 1000*l.* 3 per cent. stock.

Looking at the case, it appears to me, that the strong probability is, that the fund, which was transferred by *Sarah Liddard* to *Susannah Clay* — the sum invested in the *French* funds — was the property of the bankrupt;

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that

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that it was the produce of the property, with which the bankrupt had carried on business in this country, and which he had afterwards invested in the *French* funds; and if so, it belongs to the Plaintiff.

The question before me is, how far ought the Court to interfere by injunction to restrain the transfer of property in the *English* funds, which the defendants have derived from *Sarah Liddard*.

Of the property which *Sarah Liddard* disposed of by her will, she had an absolute power of appointing the 1500*l.* 3 per cents., the 5*l.* Long Annuities, and the 1000*l.* 3 per cents. These sums, therefore, must be considered as her property, and subject to the payment of all debts, to which she was liable. Under these circumstances, it appears to me, that, as she has executed an appointment in favour of *Susannah Clay*, one of her sisters — as *Susannah Clay*, having taken out administration in this country, is about to return to *France* — as the parties interested under *Mrs. Liddard's* will reside there, and as she, if not prevented, will probably remove the property thither — this Court ought to interpose for the purpose of preventing the removal of these funds at present, upon which, if the evidence turns out sufficient to support the facts of the case, as I think it will, the assignee will have a claim. I think, therefore, the Vice-Chancellor was right in ordering, that, as to the 1500*l.* 3 per cents., the parties should be restrained from making a transfer.

The Vice-Chancellor was of opinion, that there was a difference between the 1500*l.* 3 per cents., on the one hand, and the 5*l.* Long Annuities, and the 1000*l.* 3 per cents., on the other. Upon looking at the documents and papers before me, I see no difference whatever between

tween the funds. It is perfectly clear, that *Sarah Liddard*, in the events which have occurred, had an absolute power of disposal over the 59*l.* Long Annuities, and also over the 1000 3*l.* per cents.; and if she has exercised the power, it appears to me that, under such circumstances, the Court would not be justified in allowing a transfer of the last mentioned funds to take place, the effect of which would be to render the further proceedings of the Plaintiff nugatory.

I think the injunction granted by the Vice-Chancellor ought to be continued, and that it should be extended, both to the 59*l.* Long Annuities, and to the 1000*l.* 3 per cent. stock.

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Jan. 22.
April 15.

WOOD v. WOOD.

As between the client and the solicitor, the Court will take care that the client shall not be a sufferer in respect of unnecessary proceedings instituted by the solicitor.

A solicitor in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect.

A PETITION presented in this cause imputed various acts of misconduct to the solicitor who had had the conduct of the suit.

Mr. *Bickersteth* and Mr. *Wray*, for the petition.

One charge against the solicitor was, that he abandoned a suit which was depending, and unnecessarily instituted a second suit, though every useful purpose might have been accomplished by means of the first suit; or, at least, much expense might have been saved by adopting the proceedings in it.

The LORD CHANCELLOR.

If a suit is depending, and is prosecuted up to a certain point, and if the solicitor improperly abandons that suit, and unnecessarily institutes a new suit, the Court will take care that the client shall not suffer by the adoption of such a course of proceeding.

A receiver had been appointed in the first suit. He died; no new receiver was appointed: and after the institution of the second suit, the solicitor began to receive the rents, rendered accounts in the form of a receiver's accounts, and charged poundage. It was alleged that some of the rents had been lost by his neglect; and one object of the petition was, to make him answerable for the sums so lost.

On

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On his behalf it was contended, that it was not his duty to collect the rents; and the circumstance of his having, without any proper authority, received some of the rents, could not render him accountable for more than he received.

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v.
Wood.

The LORD CHANCELLOR.

The second bill contained no prayer for a receiver; and no receiver was appointed in that suit: but this gentleman appears to have taken upon himself to act as receiver; and, from his conduct, the parties had every reason to believe that he had been appointed by the Court to succeed the former receiver. My opinion is, that, if a solicitor in a cause, having assumed to himself improperly the character of receiver, neglects the duty of a receiver, and does not properly collect the rents, while the parties consider him to be acting as receiver, he makes himself responsible for any of the rents which are lost in consequence of his neglect.

1828.

April 15.

THE KING OF SPAIN v. MACHADO.

Order made to stay proceedings to enforce an answer, pending an appeal to the House of Lords from an order overruling a demurrer.

AFTER the allowance of the demurrer to a former bill*, the King of *Spain* alone filed another bill against the same Defendants, and for the same purposes as before. The Defendants demurred again; the demurrer was overruled by the Lord Chancellor; and the Defendants appealed to the House of Lords.

The Defendants now moved, that the proceedings to enforce an answer might be stayed, pending the appeal.

Mr. *Pepys* and Mr. *J. Russell*, for the motion, cited *Wood v. Milner*. (a)

The *Attorney-General* (Sir *Charles Wetherell*), Mr. *Horne*, and Mr. *Wheatley* *contra*, insisted, that the Defendants were not entitled to the indulgence now sought, or, at least, that it ought not to be granted to them, unless they would give security for the large sums which the bill alleged to be in their hands.

The LORD CHANCELLOR made the order, but gave the Plaintiffs the costs of the motion.

(a) 1 *Jac. & Walk.* 636.

* See *supra*, 225.

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Ex parte WHALLEY.

April 26.

THIS was a motion under the 6 *Ann. c. 18.*, on the part of a person entitled in fee to an estate, subject to a lease for lives, that the persons claiming under that lease might be ordered to produce the persons on whose lives the lands were holden. The motion was made *ex parte*, but upon an affidavit such as the statute requires.

Order made, *ex parte*, under the 6 *Ann. c. 18.*, that a lessee for lives should produce the *cestui que vie* to persons named, and at a time and place specified, in the order.

Mr. Beames, in support of the motion, cited *Ex parte Grant (a)*, and stated, that in that case, as appeared by the entry in the Reg. Lib. under the name of *Ex parte Grint and Others*, the place at which, the time when, and the persons before whom, the *cestui que vie* was to be produced, were inserted in the order. He proposed that the order should, in the present instance, be made in the same form.

The LORD CHANCELLOR made the order accordingly.

(a) 6 *Ves.* 512.

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BETWEEN

May 2. 3. ROBERT HICHENS, JOHN MOXON, THOMAS HENRY PARKER, WILLIAM MORGAN, and JOHN FRYER, on behalf of themselves and all other Shareholders in the Arigna Iron and Coal Company, - - - Plaintiffs;

AND

Sir W. CONGREVE, Bart., JOSEPH CLARKE, HENRY CLARKE, JOHN DUNSTON, JOHN BENT, JAMES BROGDEN, JOSEPH MACLEAN, TIMOTHY FRANCIS POWER, AUBONE ALTHAM SURTEES, HENRY DES RIVIERES BEAUBIEN, and JOHN HINDE, and also JOHN SCHNEIDER the Younger, (when within the Jurisdiction of the Court,) Defendants.

Some shareholders in a joint stock company may sue, on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company to refund monies improperly withdrawn by

them from the stock of the company, and applied to their own use.

A demurrer to such a bill, on the ground that all the shareholders are not parties, cannot be sustained.

A clause in an act of parliament, passed for the regulation of a joint stock company, provided, that all proceedings, whether at law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons should be a member or members of the company or not, should be instituted and carried on in the name of the chairman or of one of the directors as the nominal plaintiff: such a clause does not apply to a case in which directors appropriate to their own use part of the joint stock by charging the company with a much larger sum, as the price of property purchased by them, than was actually paid.

THE bill stated, that *Roger Flattery*, the owner of certain mines near *Arigna*, being desirous of selling his interest in them, and anxious that a joint-stock company should be formed for the purpose of working them, proposed to *Sir W. Congreve*, in *June 1824*, to engage in the formation of such a company; — that various discussions took place between *Flattery* and *Congreve* as to the terms on which the mines should be sold to the proposed company when formed; — that, on the

the 30th of *June* 1824, a memorandum of agreement was drawn up by *Congreve*, or with his privity, but was not signed, whereby *Flattery* agreed to treat with him, and such persons as he should authorize, for the formation of a company for working the said mines, on certain terms therein alluded to, but not stated; and *Flattery* engaged not to treat with any other person for the disposal of these mines, unless it should be found impracticable to form a company, while Sir *W. Congreve*, on the other hand, undertook to use his utmost endeavours to establish a company in conformity to the conditions of that agreement; — that the terms of the purchase contemplated between the parties were afterwards set down in writing, and such terms were, that *Flattery* should receive 10,000*l.* and one fifteenth of the profits of the concern, besides a thousand shares in it, and certain other advantages; — that Sir *W. Congreve* entered into a negotiation with *Joseph Clarke* and *Henry Clarke*, in order to procure their assistance in the formation of the company; — that they suggested that a profit should be secured for the benefit of the promoters of the speculation, by charging the company with a higher price for the mines than should be actually paid to *Flattery*; and this profit, it was proposed by Sir *W. Congreve*, should be divided amongst the directors; — that the Messrs. *Clarkes* and the agent of Sir *W. Congreve* agreed with *Flattery*, that the mines should be sold to the intended company for 10,000*l.*, and that *Flattery* should further have 1000 shares in the company, a proportion of the profits, and certain other advantages; — that it was arranged between the agent of Sir *W. Congreve* on his behalf, and the Messrs. *Clarkes*, that the mines, so purchased for 10,000*l.*, should be charged to the company at 25,000*l.*, and that the surplus of 15,000*l.* should be divided amongst Sir *W. Congreve* and Messrs. *Clarkes*, their friends and agents; — that, for the purpose of carrying the aforesaid arrangement

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ment into effect, two agreements in writing were prepared, dated respectively the 30th of *October* 1824;— that one of these agreements was made between *Flattery* of the one part, and *John Vivian*, who had been for many years in the service of *Henry Clarke*, and was named for that purpose by him, and *Henry Joseph Besouth Hinde*, who was an agent of Sir *W. Congreve*, and nominated on his behalf, of the other part; and that it was thereby agreed, that *Flattery* should sell and assign his interest in the *Arigna* mines and other property to *Vivian* and *Hinde* for 10,000*l.*, to be paid by instalments; and that a company should be formed for the purpose of working the mines, in which *Flattery* was to have a thousand shares, besides being entitled to one fifteenth of the profits;— and that this agreement was signed by *Flattery*, but was not signed by *Vivian* or *Hinde*, who, in truth, had no knowledge of it; their names being inserted in it merely as agents, and in lieu of the names of Messrs. *Clarkes* and Sir *W. Congreve*, and in order to conceal the fact, that Sir *W. Congreve* and Messrs. *Clarkes*, who were afterwards to affect to purchase the mines for the sum of 25,000*l.*, had really bought the same for the sum of 10,000*l.*

The other agreement, made between and signed by the solicitor of Sir *W. Congreve* on his behalf, and *Henry Clarke*, on behalf of himself and *Joseph Clarke*, after reciting that the parties had agreed to form a company for the purpose of working the *Arigna* mines in *Ireland*, and that Sir *W. Congreve* was to be the chairman, and certain other persons directors, proceeded as follows:—“Whereas the said mines were originally purchased by the said Sir *W. Congreve*, *Joseph Clarke*, and *Henry Clarke*, of the said *Roger Flattery* for the sum of 10,000*l.*, and subject to other charges, as is particularly mentioned in the conveyance thereof, which was,

was, by direction of the said parties, made to a nominee on their parts: and whereas the said Sir *W. Congreve*, *Joseph Clarke*, and *Henry Clarke*, by their nominees as aforesaid, have agreed for the sale of the said mines for the sum of 25,000*l.* to the said company so intended to be formed; and it has been agreed, that the sum of 15,000*l.*, being the difference in the said purchase-mones, shall, when received, be divided in manner hereinafter mentioned, that is to say, that 1000*l.*, part thereof, be paid to *John Hinde*, one other 1000*l.*, other part thereof, be paid to Mr. *Beaubien*, as the agents of Sir *W. Congreve*, and that 2000*l.*, further part thereof, be paid to Messrs. *Clarke*, to be divided by them amongst their agents; that the three several respective sums of 2000*l.*, making together 6000*l.*, be paid and divided equally between Sir *W. Congreve*, *Joseph Clarke*, and *Henry Clarke*; and that the further and remaining sum of 5000*l.* be divided by the said Sir *W. Congreve* and Messrs. *Clarke*, either amongst the directors generally, Sir *W. Congreve* being one of them, or equally amongst themselves."

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The bill, after setting forth this agreement, alleged, that the statement contained in it, that the mines had been assigned to a nominee of Sir *W. Congreve* and Messrs. *Clarke*, and that they, by such nominee, had agreed to sell the same to the intended company for 25,000*l.* was totally untrue; that, for the purpose of giving colour to the transaction, and concealing the truth from the persons who should become members of the proposed company, it was at that time intended, that an assignment of the mines should be made either to *Vivian* and *Hinde*, or some other person, on behalf of Sir *W. Congreve* and Messrs. *Clarke*, and that then a pretended agreement should be made with such individual, on the part of the company, for the purchase of the mines at the price of 25,000*l.*; but that it was afterwards considered

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sidered that such a course might lead to a discovery of the truth, and that it was therefore agreed by *Congreve* and the *Clarkes*, with the consent of *Flattery*, that the transaction should be represented as a purchase, on the part of the company, from *Flattery*, but that the price paid to him should be misrepresented to the shareholders, and that the sum of 25,000*l.* should be charged to the company, as paid to *Flattery*, and that the sum of 15,000*l.*, the difference between the real price and the pretended price, should be secretly divided in the manner before mentioned;—that, afterwards, a prospectus of the company was printed, and a deed for vesting the mines and other property in trustees for the company, and a deed for establishing it, were prepared, and all the Defendants (except *Beaubien* and *Hinde*) were appointed directors and accepted the office;—that, at a meeting of the directors, held on the 5th of *November* 1824, at which *Hinde* was present as the agent of Sir *W. Congreve*, certain resolutions were entered into, one of which was, that the purchase of the mines from *Flattery* at the price of 25,000*l.*, on the conditions therein mentioned, should be completed;—that the parties present at the meeting well knew, that the sum of 25,000*l.* was not to be paid to *Flattery*, but that he was to receive 10,000*l.* only, and that the resolutions were passed for the purpose of concealing and disguising the truth;—that, in pursuance of these resolutions, the conveyance from *Flattery* to the trustees of the company was executed;—that, before this time, the plaintiffs had become proprietors of shares in the company, and were wholly ignorant that 25,000*l.* was not the sum actually agreed to be paid to *Flattery* for the mines;—that, by means of the deposits paid by or on account of the Plaintiffs and the other shareholders, a sum of 30,000*l.*, or thereabouts, was, previously to the month of *December* 1824, raised and paid to the bankers of the company;—that the directors agreed to pay
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to *Flattery*, for materials furnished and work alleged to have been done by him the sum of 1650*l.*, making, with 25,000*l.*, the pretended consideration for the purchase, 26,650*l.*;—that drafts to that amount were drawn by the proper number of directors upon the bankers of the company, payable to *Flattery* or bearer, all of which drafts were dated on the 8th of *December* 1824;—that all these drafts were paid by the bankers of the company out of the funds thereof, and were all charged and entered as paid to *Flattery*; though none of them were, in fact, ever delivered to *Flattery*, or paid to him or for his use, but all of them were delivered to or taken by *Henry Clarke*, who received the amount from the bankers of the company out of the company's funds;—that the sum of 10,000*l.* was paid to *Flattery* in the following manner, — 150*l.*, when the agreement of the 30th of *October* 1824 was signed; 5000*l.*, by payments to the bankers in respect of his deposit on 1000 shares; and the residue, by payments made by *Henry Clarke*, partly in cash and partly by drafts;—that, after such payments, there remained in *Henry Clarke's* hands the sum of 15,000*l.*, out of which certain expenses to the amount of 30*l.* were defrayed, leaving a balance of 14,970*l.*;—that, out of this balance of 14,970*l.*, 1000*l.* was paid by Sir *W. Congreve*, *Henry Clarke*, and *Joseph Clarke*, or some or one of them, according to the agreement of the 30th of *October* 1824, to *Henry des Rivieres Beaubien*, and another sum of 1000*l.* to *John Hinde*; that 2500*l.* was handed over to *Congreve*, and converted by him to his own use; that it was agreed that the remaining sum of 10,470*l.* should be divided equally amongst the directors of the company, exclusive of Sir *W. Congreve*; that, accordingly, *Henry Clarke* and *Joseph Clarke* retained each the sum of 1047*l.*, and paid a like sum of 1047*l.* to each of the Defendants, *John Bént*, *James Brogden*, *Joseph Maclean*, *John Dunston*,

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Timothy Francis Power, and Aubone Altham Surtees; — that they paid over another sum of 1047*l.* to Sir *W. Congreve* on behalf of *John Schneider*, but without the knowledge of *Schneider*, and they retained in their hands the like sum of 1047*l.* for the Plaintiff *William Morgan*, who had been appointed a director, but was then abroad and had not assented to the appointment, if he should think proper to accept the same; that *Beaubien, Hinde, Bent, Brogden, Maclean, Power, Dunston, and Surtees*, when they respectively received these sums, believed, or had good reason to believe, that 25,000*l.* had not been really paid to *Flattery*, and that the monies so received by them, were part of the difference between the sum actually paid to *Flattery*, and the sum charged to the company as paid to him; — and that these transactions were kept secret from the Plaintiffs and the other share holders, and were not discovered by them, till *November 1825*.

The bill further stated that an act of parliament was passed and received the royal assent on the 22nd of *June 1825*, intituled “An Act to encourage the working of mines in *Ireland* by means of *English* capital, and to regulate a joint stock company for that purpose, to be called the *Arigna Iron and Coal Company*,” whereby it was amongst other things enacted, that Sir *W. Congreve, Joseph Clarke, Henry Clarke*, the Plaintiff *William Morgan*, and the several other persons before named as directors of the company, and various other individuals, to the number in the whole of about two hundred, and their executors, administrators, and assigns, and all persons who should, from time to time, hold shares in the company, so long as they should hold such shares, should be a joint stock company, by the name and description of the *Arigna Iron and Coal Company*; and various powers were given to them, and various provisions were made for the regulation of the association.

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The bill insisted, that the parties, who concurred in charging the company with 25,000*l.* as the price of the mines, when 10,000*l.* only was paid, had committed a fraud upon the other shareholders; that *Congreve* and the two *Clarkes* were each of them answerable to the company for the whole of the 15,000*l.*, with interest thereon at 5*l.* per cent.; and that *Bent*, *Brogden*, *Mao-lean*, *Power*, *Surtees*, *Dunston*, *Beaubien*, and *Hinde*, were each answerable for such part of that sum as had been received by them respectively, with interest. It charged, that, in fact, there never was any bargain made by *Congreve* and the *Clarkes* with the company, or any members of it, for the sale of the mines, and that the true plan and contrivance was, that the mines should be charged to the company at a price different from that at which they were really bought; that, at the meeting of the 5th of *November* 1824, the company had not been actually formed, and the only persons present were directors and agents, who were parties and privies to the fraud intended to be practised; and that it never was communicated or disclosed to the Plaintiffs, or any of them, or to any of the other shareholders, at the time when they became proprietors, and paid their instalments (except only to those who participated in the profits of the fraud), that the sum of 25,000*l.* was not to be paid to *Flattery*, or that *Congreve* and the *Clarkes*, or any of them, had any interest in the monies, or were to derive any benefit from the purchase.

The prayer was, that it might be declared that such appropriation of 15,000*l.* out of the funds of the company was a fraud upon the Plaintiffs and the other shareholders; that *Congreve* and the two *Clarkes* were liable, jointly and severally, to make good the whole amount to the company with interest at 5 per cent., and that each of the Defendants was answerable for the sum received by

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him;

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him; that they might be decreed to pay the same accordingly, and that such sum, with interest, might be paid to the bankers of the company, to the company's account and for the company's use.

Beaubien and *Hinde* demurred for want of equity, and because all the shareholders were not parties to the suit.

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 July 17.

Sir *Anthony Hart*, Vice-Chancellor, overruled the demurrer.

The Defendants appealed.

Mr. *Twiss* and Mr. *L. Lowndes*, for the demurrer.

First, the transaction in substance amounts to no more than this, that Sir *Wm. Congreve* contracted for the purchase of these mines for 10,000*l.*; that afterwards a company was formed, who agreed to pay 25,000*l.* for them; and that Sir *Wm. Congreve* and his friends have shared the profit. It is not alleged that the mines are not worth 25,000*l.* It might be prudent in *Flattery* to sell them for 10,000*l.*, because he had not the capital requisite for deriving benefit from them; to a joint stock company, with funds sufficient for working them on a great scale, they may be worth four times that sum. It was of no importance to the company from whom the purchase was actually made, or what previous agreement may have subsisted between *Flattery* and Sir *Wm. Congreve*: the only points, which concerned the shareholders, were—the price to be paid, and the value of the property which was to be given in exchange. When Sir *Wm. Congreve* made his arrangement with *Flattery*, the company did not exist; in no part of the transaction was he their agent.

Secondly,

Secondly, supposing the shareholders to have a ground of complaint, they ought to sue, as in *Colt v. Woollaston* (a), each for the sum of which he conceives himself to have been defrauded; and one or two have no right to claim redress for all the shareholders. If the money of the persons, who, in *December* 1824, had subscribed for shares in this speculation, has improperly found its way into the pockets of the Defendants, those persons may, perhaps, have some title to recover their aliquot proportions. But this bill does not profess to seek relief for individuals: it affects to assert the rights of all the present shareholders, whoever they may be: and its object is, to bring back certain monies into the joint stock of the concern.

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Thirdly, this company, not being incorporated by the act of parliament, is a mere partnership; and therefore all the partners ought to have been made parties to the suit; the more especially that its only purpose is, to regulate to a certain extent a partnership transaction. The case does not come within the exception, which, under certain circumstances, permits some, out of a great number, to sue on behalf of themselves and others; first, because it nowhere appears in this bill, that the shareholders are so numerous, that they might not all be brought before the court without inconvenience; and, secondly, because a few have been permitted to sue on behalf of themselves and others, only where an account was to be directed, in the prosecution of which every individual interested would, if he pleased, have an opportunity of becoming substantially a party to the proceeding. Here there is no account asked, nor, according to the case stated by the bill, will any account be decreed.

Were

(a) 2 P. Wms. 154.

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Were this suit to proceed, the single question in it would be, whether the Defendants are or are not to refund 15,000*l.*; and that point would be decided at the hearing on the evidence in the cause; so that the rights of all the partners would be finally determined, in a form of proceeding, in which the great mass of the shareholders would have no opportunity of watching over their own interests. The bill prays that the 15,000*l.* with interest may be paid to the bankers of the company for the use of the company; many of the shareholders may choose rather to receive with their own hands their proportions of the sum.

Fourthly, if the suit is to be considered as, in substance, a suit by the company to assert the rights of the company against individuals, the form of proceeding, which the act of parliament has prescribed, ought to have been followed. The act referred to in the bill (a) is declared to be a public act; and the third section provides*, that all proceedings, whether in law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons shall

(a) 6 G. 4. c. clxxxi.

* "And be it enacted, that all actions, suits, and proceedings, whether at law or in equity, or otherwise, to be commenced, instituted, and prosecuted or carried on by or on behalf of the said company, against any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members of the said company or not, shall

and lawfully may be commenced, instituted, and prosecuted or carried on in the name of the person who shall be for the time being the chairman of the directors of the said company, or in the name of any one director for the time being of the said company, as the nominal plaintiff or party proceeding for and on behalf of the said company; and that all actions, suits, and proceedings, whether at law or in equity, or otherwise, to be commenced,

shall be a member or members of the company or not, shall be instituted and carried on in the name of the chairman, or of one of the directors as the nominal Plaintiff. This clause afforded every facility for obtaining full relief. But the Plaintiffs have chosen, neither to adopt the course prescribed by the act of parliament, nor to comply with the general rules of the court by making all the shareholders parties.

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Mr. *Horne*, Mr. *Sugden*, Mr. *Lee*, and Mr. *Pemberton*,
for the Bill.

The cases cited in the argument were, — *Chancey v. May* (a), *Good v. Blewitt* (b), *Cockburn v. Thompson* (c), *Blain v. Agar* (d), *Gray v. Chaplin* (e), *Van Sandau v. Moore*. (g)

The

(a) *Proc. in Cha.* 592.

(b) 13 *Ves.* 397.

(c) 16 *Ves.* 321.

(d) 1 *Sim.* 57.

(e) 2 *Sim. & Stu.* 267. and

2 *Russell*, 126.

(g) 1 *Russell*, 441.

commenced, instituted, and prosecuted or carried on against the said company by or on behalf of any person or persons, body or bodies politic or corporate, whether such person or persons, body or bodies politic or corporate, is or are or shall then be a member or members of the said company or not, shall and lawfully may be commenced, instituted, and prosecuted or carried on against the person who shall be for the time being such chairman, or against any one director for the time being of the said company, as the nominal defendant or party proceeded against for and on behalf of the said

company; and that all prosecutions to be commenced, instituted, or carried on by or in behalf of the said company, against any person or persons, for embezzlement, robbery, or stealing of the monies, goods, effects, or property of the said company, or for fraud upon or against the said company, or for any other crime or offence committed against or with intent to injure or defraud the said company, shall and lawfully may be so commenced or instituted and carried on in the name of such chairman, or any such director for the time being of the said company:" &c.

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The LORD CHANCELLOR.

Upon the face of the bill I cannot help considering the transactions stated in it to be fraudulent. Sir *William Congreve* entered into a negotiation with *Flattery* for the purchase of the property in question at the price of 10,000*l.* for a joint stock company of which he was to be a member and director. After the treaty was begun, the two *Clarkes* associated themselves with Sir *William Congreve* in the scheme; and the negotiation with *Flattery* went on. The object was, the purchase of the *Arigna* mines, in order that they might be conveyed to a company by whom they were to be worked; and the company was to consist, not of *Congreve* and the *Clarkes* alone, but of a considerable body of shareholders.

It appears that, in the course of these negotiations, *Congreve* and the *Clarkes* became desirous of making a profit out of the original transaction for the purchase of *Flattery's* interest in the mines. The first plan, which occurred to them, was, that a conveyance for the sum of 10,000*l.* should be made to persons nominated by them, who were afterwards to convey to the company for 25,000*l.* If such a transaction had taken place, and the particulars had been concealed from the company, it could not have been sustained; for, considering the situation in which *Congreve* and the *Clarkes* stood with reference to the company, it would have been incumbent on them to have communicated the real price at which the mines had been purchased of *Flattery*. This objection seems to have occurred to them; and, accordingly, another shape was given to the proceedings. The plan now adopted was this,—that a conveyance should be executed directly from *Flattery* to trustees for the company; and although *Flattery* had agreed to convey the property for 10,000*l.*, that in this conveyance it should
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be stated that the purchase-money was 25,000*l.*, in order that the difference might be put into the pockets of Sir *William Congreve* and the two *Clarkes*, and some other individuals whom they might choose to nominate. Such a transaction is so incorrect, that it is quite impossible that any court of justice could permit it to stand; and if, after the conveyance had been so made, reciting that the price paid to *Flattery* was 25,000*l.*, a company of shareholders was formed, who acted upon that representation, they could, in justice, be chargeable only with the money actually paid to *Flattery*; and if a larger sum was taken out of their funds, they would be entitled to call on the individuals, into whose hands it came, to refund it. In substance, therefore, the plaintiffs are entitled to relief.

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The only other question is, Whether, in point of form, there is any objection to this bill?

The suit is instituted by certain shareholders on behalf of themselves and all others who may choose to come in and take the benefit of the suit. It has been argued, that the case comes within the clause of the act of parliament. I doubt whether the terms of the clause are sufficient to comprehend it; and the spirit of the act does not extend to transactions such as are in question here. That clause was introduced, in order that, where the company was concerned on one side, and individuals contracting with it, being, perhaps at the same time members, were concerned on the other, suits might be carried on, without being impeded by the objections which would otherwise have arisen.

Here is a fund in which all the shareholders are interested; 15,000*l.* has been improperly taken out of it: a fraud has been committed on them all. Is it necessary
 that

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that all should come into a court of justice, for the purpose of joining in a suit with a view to obtain redress? It is possible that the number of shareholders may be six thousand, for the capital of the company is fixed by the act of parliament at 300,000*l.*, divided into shares of 50*l.* each; and justice never could be obtained, if any very great number of Plaintiffs were put on the record.

It is said that there is nothing on the face of the bill which shews that the shareholders are so numerous, that they could not all be joined as parties without inconvenience. I think it does appear sufficiently, that, if all were joined, the number of complainants would be inconveniently great; first, because the shares are six thousand in number, and, secondly, because it appears by the act of parliament that there were then upwards of two hundred shareholders. It is clear, therefore, that justice would be unattainable, if all the shareholders were required to be parties to the suit.

It is said, each shareholder might file a bill to recover his proportion of the money. Such a course would produce enormous inconvenience. Are two hundred bills to be filed, in order to do justice in this matter? If justice can be done in one suit, the Court will sustain such a proceeding; for to require all the shareholders to be parties, or to leave each shareholder to file a separate bill to redress his own wrong, would, in substance, be a denial of justice.

In the present case, it appears to me that justice may be done in one suit. All the shareholders stand in the same situation; the property has been taken out of their common fund; they are entitled to have that property brought back again for the benefit of the concern. When all parties stand in the same situation, and have
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one common right, and one common interest, in what respect can it be inconvenient that two, or three, or more, should sue in their own names for the benefit of all?

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It is said that the prayer of the bill is incompatible with this form of proceeding; for it asks that the transaction may be declared fraudulent, and that the Defendants may be ordered to pay the 15,000*l.*, with interest, to the bankers of the company, on the account and for the use of the company. Whether, ultimately, the decree will be in that precise form, is not now the question. The Court may think it right to direct the money to be repaid with interest; or it may direct inquiries; and it is not improbable that the money may be ordered to be brought back into the general funds of the society. But, whatever may be the particular form of relief, which may ultimately be given, there is no doubt that, if, at the hearing, it appears that this 15,000*l.* was obtained by fraud, the Court will make a decree, the effect of which will be to compel those, who were parties to the transaction, to refund the money to those to whom it rightfully belongs.

Demurrer overruled.

May 19.

GARDNER v. ROWE.

An attachment is irregular, if it is sealed and delivered out by the sealer before, though it is not parted with till after, the requisite affidavit is filed.

THIS was a motion to discharge an attachment for irregularity, on the ground that it had issued before an affidavit was filed.

On the 22d of *August*, a *subpœna* for costs was served on the Plaintiff *Collins*, and the amount demanded from him. He paid the amount to his own solicitor, who took upon himself to pay it into the hands of the under sheriff of *Middlesex*, though no attachment had then issued. On the 4th of *September*, an attachment was bespoken, and an affidavit of the service of the *subpœna* was left with the clerk in court. He did not file the affidavit till the 6th of *October*, and did not deliver out the attachment till the 7th of *October*. It had been sealed upon the 3d of that month.

Mr. *Agar*, in support of the motion.

The general order of the 23d of *January*, 1629, (a) provides, “that neither the six clerks, nor any of the cursitors, nor the registrar of the court, their clerks or deputies, do make, pass, or enter any orders for attachments, commissions of *dedimus potestatem*, or other commissions, writs, processes, or proceedings, grounded upon an affidavit, unless the said affidavit be first filed and registered in the affidavit office as aforesaid.” That order was confirmed and enforced by the general order of the 28th of *February* 1632 (b); and another order of the 20th of *May*, 1659 (c), says, “neither shall any process
of

(a) *Beames' Orders*, 57.

(b) *Ibid.* 63.

(c) *Ibid.* 142.

of contempt issue, before such affidavit be duly filed with the said register of affidavits, whereby recourse may be had to the same as occasion may require." The order of the 15th of *November*, 1660 (*a*), is to the same effect. In *Broomhead v. Smith* (*b*), which occurred in 1803, it was suggested that these orders had fallen into disuse, and that for many years it had been considered to be the established practice, that the process was regular, if the affidavit was left with the clerk in court, and filed at any time before the return of the writ. A practice, which permitted process, affecting the liberty of the subject, to issue before the filing of the affidavit on which it was grounded, was irrational. But, after the case of *Broomhead v. Smith*, there was no pretext for any deviation from the orders for time to come. For Lord *Eldon*, with the concurrence of Sir *William Grant*, there said (*c*), "The best way will be not to decide upon the point of practice, but to make an order now, that no such process shall issue in future, without an affidavit previously filed; of the propriety of which we have no doubt." Here the attachment issued before the 6th of *October*; for it was sealed before that day, and was in the hands of the clerk in court, who is the agent of the party issuing it, and may part with it at any time he pleases.

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Mr. *Knight*, *contra*.

When the writ of attachment is bespoken, the affidavit, on which it is to be grounded, is left with the clerk in Court; it is his business to file it in due time; and the uniform practice * has been, never to consider it

(*a*) *Beames' Orders*, 147. (*b*) 8 *Ves.* 557. (*c*) 8 *Ves.* 565.

* The practice is stated thus in *Harrison's Practice*, p. 400. *Newland's* edition:—"It is sufficient to file an affidavit any time before or the day an attachment is made out, but not afterwards."

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it necessary to file the affidavit, till immediately before the officer of the Court parts with the writ. So long as the attachment is in the hands of the officer of the Court, it cannot be considered as issued: it is issued, only when it is delivered to the party who has a right to put it in execution. *Broomhead v. Smith* (a) corrected the practice of not filing the affidavit till the attachment was returnable; but it did no more. The course of proceeding, which was remedied there, was improper; because the party, against whom the attachment issued, might have been taken upon it, and detained in custody, without having the means of ascertaining what the affidavit was, upon which the regularity of the process depended. No such inconvenience can attend the practice, as now understood: because the affidavit must be filed, before the process can be put in force.

The LORD CHANCELLOR was of opinion, that, after the case of *Broomhead v. Smith*, the order of 1629 could not be considered as not in force; that, upon all the orders taken together, the attachment ought not to exist, till the affidavit was filed; and that the attachment must be taken to be issued, when it is delivered out by the sealer.

The attachment was discharged with costs.

(a) 8 Ves. 357.

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GORDON v. CALVERT.

May 21, 22.

FELIX CALVERT and Co. having agreed to take *Richard Edwards* into their service as collecting clerk, but not for any definite period, he, together with *Gordon* and *Kent*, in May 1820, executed a joint and several bond to two of the partners, for the penal sum of 2000*L.*, with a condition to be void, if he *Edwards* should, from time to time and at all times during his continuance in the service of the firm, duly account for all his receipts. *Gordon* died on the 31st of October 1821; and his executrix shortly afterwards sent to *Calvert* and Co. a letter, informing them of his death, and stating that she would no longer remain surety for *Edwards*. To this letter *Calvert* and Co. returned no answer; but they shewed it to *Edwards*, and required from him further security; and, in January 1822, *James Ives Edwards* executed to them a bond for the same penal sum, and with the same condition as the first bond. This second bond recited the first, and purported to be given as an additional and further security. *Kent* died, and also *James Ives Edwards*; but no further security was required by *Calvert* and Co.

In 1826 *Richard Edwards* died; and it was then discovered, that there were deficiencies in his accounts to the amount of upwards of 1700*L.*, principally in respect of sums received by him after January 1822.

An action being brought on the bond against the executrix of *Gordon*, she filed her bill, and obtained the common injunction. The Defendants afterwards put

B. being hired as a clerk to *A.* and Co., but not for any definite period, *C.* and *D.* joined with him in a bond to secure his duly accounting for his assets; *C.* died, and his executrix gave a written notice to *A.* and Co. that she would no longer remain surety; *A.* and Co. communicated this notice to *B.*, and required and obtained from him the bond of another surety; *D.* died, and also the new surety; and, four years and a half after the death of *C.*, *B.* died, when deficiencies were found in his accounts, subsequent to the notice: Held, that the executrix of *C.* had no equity to restrain *A.* and Co. from proceeding at law on the bond.

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in their answer, admitting the facts as above stated, but denying that they ever intended to release *Gordon's* estate, or that the bond of *James Ives Edwards* was taken otherwise than as an additional security; and upon this answer the Vice-Chancellor dissolved the injunction. (a)

The Plaintiff now moved before the Lord Chancellor, that the order of the Vice-Chancellor might be discharged, and that an injunction might issue to restrain the action on the bond.

The *Attorney-General* (Sir *Charles Wetherell*), Mr. *Treslove*, and Mr. *Swann*, for the Plaintiff.

It is absurd to say that such an obligation of suretyship as has been entered into here, shall subsist as long as *Calvert* and Co. please. The services of *Edwards* might have been determined at any moment by either him or them; and the sureties must have had a right to protect themselves from future liability. A suretyship for an indefinite period is not a suretyship which is to last for ever, or which is determinable only at the will of him who has the benefit of it. When *Calvert* and Co. received the letter of the executrix, they might either dismiss *Edwards* from their service, or continue to employ him, without relying any longer on *Gordon's* responsibility: but could they say to the executrix, "We shall continue to employ *Edwards*; and as long as we choose to retain him in our service, the assets of your testator shall remain answerable to us?" If she had filed a bill in *November* 1821, to have the amount of her liability in respect of *Edwards's* receipts up to that time ascertained, and upon satisfying whatever might be then due, to be relieved from further responsibility,

(a) 2 *Sim.* 253.

sibility, could *Calvert* and Co. have insisted that the assets should be a security for the future dealings between them and *Edwards*?

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Besides, the notice was not resisted; it was received and acquiesced in; and *Calvert* and Co. protected themselves by requiring and obtaining the security of a new obligor.

Mr. *Sugden* and Mr. *Garrett*, *contra*, were not heard.

The LORD CHANCELLOR stated, that, if the executrix had a right to say, "I will not be liable any longer," and if the notice, which she gave to *Calvert* and Co., put an end to her liability, that defence was as available at law as in equity*; that there was nothing to shew that the obligees acquiesced in the wish of the testatrix to be released; that there was no ground on which the Court could say, that, when the second bond was executed, there was an intention to give up *Gordon's* security,—and the contrary was expressly sworn; and that it was reasonable to require a further security, as *Gordon's* executrix would be answerable only to the extent of the assets. He was, therefore, of opinion that there was no ground for the interposition of a court of equity; and he refused the motion with costs.

* It does not appear, that any defence of this kind was attempted in the action. See *Calvert v. Gordon*, 7 *Barn. & Cress.* 809.

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APPENDIX.

WHITE v. VITTY.*

A TESTATOR, who died in 1818, after devising a freehold house to his wife and her heirs, devised the residue of his *freehold* estates, situate in four specified parishes, or elsewhere in the county of *Cambridge*, to two trustees and their heirs, upon the trusts thereafter declared concerning the same; that is to say, upon trust that they should sell his several *copyholds* in the parishes aforesaid, and, after satisfying the costs of the sale out of the monies thence arising, should pay the residue to his executor for the purpose of satisfying, in the first place, certain legacies; and he then devised all the residue of his real and personal estate to *A. B.* The testator, besides freeholds and copyholds situate in the four parishes, had freeholds not situate in the county of *Cambridge*, and copyholds not situate within the four parishes; and all the copyholds had been surrendered to the use of his will.

The cause was argued in *November* 1826, before *Eldon*, Lord Chancellor, assisted by the Lord Chief Justice of the King's Bench, and the Lord Chief Justice of

* 2 *Russell*, 484.

of the Common Pleas; and on that occasion the two Lords Chief Justices* stated their opinions to be, —

That the beneficial interest in all the freeholds, whether situate in the county of *Cambridge* or elsewhere, passed to the residuary devisee :

That the legacies were a charge only on the copyholds situate in the four parishes :

That no estate in those copyholds passed to the trustees, but only a power to sell :

That any surplus of the monies arising from the sale, which might remain after satisfying the legacies, passed by the residuary clause : and

That the copyholds not situate within the four parishes passed to the residuary devisee.

Lord *Eldon*, after he had resigned the great seal, transmitted to the parties a written judgment, of which the material part was as follows : —

“ In this case it is perfectly clear, that legal construction will not admit, as I think, of considering the word *copyhold* as introduced by mistake instead of *freehold*; and, therefore, that the will must be construed as if the testator had directed the word *copyhold* to be inserted where it is found.

“ I agree with the Chief Justices in the opinions in which they have concurred : — that the freehold estates, (as to the beneficial interests) in the four parishes or elsewhere in *Cambridgeshire*, pass to the residuary devisee. They are given to *Richard Vitty* and *Pearse White*, or the

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the survivor, his heirs or assigns, upon the trusts thereinafter expressed or declared, that is to say; and, with the Chief Justices, I think that the residuary clause may, in construction, be connected with the devise of these freehold estates, so as to pass the beneficial interest in them to the residuary devisee. I think any other freeholds which the testator had not devised to *White* and *Vitty* would pass under the residuary devise. And as I understand all the testator's copyhold estates were surrendered to the use of the will, whether in the four parishes or out of them, I think that, as to the copyholds in the four parishes, the legacies must be paid out of the produce of them made by sale, if that produce is sufficient to pay them, and if there is a surplus, I think that surplus belongs to the residuary devisee. I also think, that, if that produce is insufficient to pay the legacies, there is no other fund created by this will out of which the deficiency can be paid. I think the copyhold not in the four parishes goes under this will to the residuary devisee."

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3. Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *primâ facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure.

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4. A business, which was the property of *A.*, was carried on in the name of *B.*, who was the agent of *A.* at a fixed salary; *A.* being under

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con-

considerable liabilities in respect of that business, *B.* became bankrupt; *A.* was held to have a lien on the property of the concern to the extent of his liabilities; and the assignees of *B.* were restrained from interfering with the business, or the property belonging to it, and from receiving monies due to it. *Foxcraft v. Wood.* Page 487

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If *A.*, for valuable consideration, undertakes to surrender a copyhold to *B.*, and *B.*, on borrowing money from *C.*, enters into a written agreement with *C.*, that he, *B.*, will surrender the same copyhold to *C.* by way of mortgage security, *A.* is not justified in refusing to surrender the copyhold to *B.*, because he, *A.*, has received notice from *C.* of the agreement between him and *B.*

The surrender by *A.* to *B.* does not prejudice, but promotes, that agreement: and *C.* is not a necessary party to a suit to compel *A.* to surrender to *B.* — *v. Walford.* 372

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ANNUITY.

A testator, by his will, gave certain annuities, and directed that

the sums, set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate: By a codicil to his will, he stated, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: Upon the death of any annuitant, the sum, set apart to secure the reduced annuity, will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer v. Mills.* Page 86

ANSWER.

1. Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee. *Montague v. Hill.* 128
2. Where the answer of a Defendant insists that a covenant was inserted, without his knowledge or consent, in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved *vivd voce* against him as an exhibit; but it may be so proved as against another defendant, whose answer does not impeach the validity of the covenant. *Barfield v. Kelly.* 355

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3. Leave refused in a tithe suit, to file a supplemental answer, setting up a modus, after the cause had been set down for hearing. *Macdougall v. Purrier*. Page 486

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1. Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance. *Attorney-General v. Butcher*. 180
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APPROPRIATION OF PAYMENTS.

A., *B.*, and *C.*, carrying on business in copartnership for a term, which would expire on the 19th of February 1807, under articles which empowered *A.*, in case of his death during the term, to bequeath his share of the trade in favour of his wife or children, — *S.*, a customer of the bank, and a surety, covenanted that they, or one of them, would pay to *A.*, *B.*, and *C.*, the survivors or survivor of them, &c. all sums which, on, before, or

until the 19th of February 1807, should become due from the customer to *A.*, *B.*, and *C.*, the survivors or survivor of them, &c.: *A.* died, having bequeathed his share of the concern to his executors, in trust for his children: the business continued to be carried on under the same firm as before; and his executors interfered in the management, and shared in the profits. At the time of *A.*'s death, the balance due from *S.* to the bank was upwards of 14,000*l.*; after that time *S.* continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after *A.*'s death, but drawing out, during the same period, a larger sum; and these subsequent dealings were contained in the same account current with the preceding dealings: some years afterwards, *S.* became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards: Held,

That the partnership, which carried on the business after the death of *A.*, was a new partnership;

That the surety's covenant did not extend to cover sums advanced to the customer by the bank after *A.*'s death;

That the balance, due at *A.*'s death from the customer, was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton v. Oakes*. Page 154

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1. An attachment, sealed after an order for time has been obtained, but before it has been served on or notified to the Plaintiff, is regular. *Hewes v. Hewes.*

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2. An attachment is irregular, if it is sealed and delivered out by the sealer before, though it is not parted with till after, the requisite affidavit is filed. *Gardner v. Rowe.*

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BANKRUPT.

French stock, the property of a bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, by her will, exercised a general power of appointment which she had over monies standing in the name of trustees in the *English* funds, and died in her husband's lifetime; one of the three sisters, who was also an appointee, and her residuary legatee, and usually resided in *France*, took out administration to her, with the will annexed. An injunction was granted at the suit of the assignee to restrain the trustees from transferring any of the stocks in the

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A petition presented by a bankrupt in person, and which he appears in person to support, is not within the order of the 12th *August*, 1809. *In the Matter of Bruce.*

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BARON AND FEMME.

1. Where a *feme covert*, having separate property, joins in a security for money advanced to her husband, the Court acts upon it, not as an agreement to charge her separate property, but as an equitable appointment under the settlement, to be satisfied from the rents and profits of that property, and not by sale or mortgage.

The death of the husband, after the filing of the bill, and before the hearing, makes no difference.

If the *feme covert* insists upon the exercise of undue influence by the husband, she must prove it; and it is not for the plaintiff to prove a negative. *Field v. Sowle.* 112

2. A *feme covert*, described as such in the will of the testator, may, during the coverture, execute by deed a power of disposition, given her by the will, over real and personal estate. *Downes v. Timperon.* 334
3. Money in court, belonging to a married woman, if less than 200*l.*, will be ordered to be paid to the hus-

husband, though she has been deserted by him and opposes the petition. *Foden v. Finney*.
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BOND.

1. The Plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond; he is only a simple contract creditor of the testator. *Jones v. Davids*. 277
2. A *Scotch* heritable bond, although it contain a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an *English* will, but descends to the heir at law. *Jerningham v. Herbert*. 388
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CHARGE ON REAL ESTATE.

1. A testator gives an annuity and pecuniary legacies, and then devises all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates to trustees, for the use and benefit of his children. The annuity, and pecuniary legacies, given prior to the devise, are well charged upon the freehold, copyhold, and leasehold estates. *Cole v. Turner*. 376
2. A testator devised certain lands to his wife for life, and after her decease, to his eldest son in fee, chargeable, nevertheless, in aid of the other estates thereafter devised to him, with the payment

of the several sums of money thereafter bequeathed to the testator's younger sons and daughters: then, after a specific bequest of personal chattels, he devised all his other real estates to trustees, until his eldest or some other son should attain twenty-one, subject to the payment of the several sums of money thereafter bequeathed to his younger sons and daughters, with a direction that his trustees should in the mean time apply the rents and profits to the maintenance, education, and advancement of all his younger sons and daughters; and then he gave to his younger sons 4000*l.* each, and to his daughters 3000*l.* each, to be paid to them at twenty-one by his eldest son, if he should attain twenty-one, or by such other son as should attain twenty-one, and become entitled to his real estates by virtue of his will; and he expressly charged all his real estates, including the remainder in fee of the lands devised to his wife for her life, with the payment of the said several sums of money so given to his younger sons and daughters: the testator died intestate as to the residue of his personal estate.—Held, that the personal estate of the testator was not applicable to the payment of these legacies or portions. *Kirke v. Kirke*. Page 435

CHARITY.

- A school-house, built prior to the 9 G. 2. c. 36., on waste of a manor given by the lord for that purpose,

purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy. *Ingleby v. Dobson*.

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See AGENT, 1.

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1. If an agreement be in part unperformed, the principle of a court of equity is compensation, not forfeiture. *Page v. Broom*. 6
2. As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smith v. Tolcher*. 302

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A transaction cannot be considered as a family arrangement, where the doubts, existing as to the rights alleged to be compromised, are not presented to the mind of the party interested. *Harvey v. Cooke*. 34

CONDITION.

A testator gives a specific bequest to A., and directs, that, in consideration of the bequest, A. shall pay his debts, and makes A. his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him. *Messenger v. Andrews*. Page 478

CONSENT.

1. A party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. *Furnival v. Bogle*. 142
2. How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by the consent of counsel in Court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Ibid*. 142

CONVERSION.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government

vernment or real securities, of which they were to stand possessed, upon trust for *A.* during her life, and, after her death, for *B.* The trustees permitted a share, which the testator had in an *Indian* loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to *A.* the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from the testator's death: Held,

That the tenant for life was not entitled to the actual interest, which the money yielded, while it remained on the *Indian* security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death;

That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the *Indian* rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the *Indian* security and invested

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1. The payment of a solicitor's bill pending a suit, does not preclude subsequent taxation. *Howell v. Edmunds.* 67
2. Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance. *Attorney-General v. Butcher.* 180
3. In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports, that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground, that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. *Long v. Collier.* 269
4. Persons, who were found by the Master to be the next of kin of the intestate, and were named by the Court to be Defendants in an issue directed to try the rights of other

other persons, who claimed also to be next of kin, were allowed a sum of 500*l.* out of the estate of the intestate, on giving security to account for it. *Gregg v. Taylor.* Page 279

5. If an heir at law, alleging insanity in a deviser, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife v. Scaife.* 309

6. The husband's costs of the proceedings in making a settlement of the fortune of a ward, whom he had married without the leave of the Court, were allowed to him out of the fund, he having no property of his own, and there being no circumstances of aggravation in his conduct. *Anonymous.* 473

Directions as to costs. *Page v. Broom.* 23, 24

COUNSEL.

See CONSENT, 1, 2.

COVENANT.

1. *A.* being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the

coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument, by which *A.* covenants not to sell or incumber the lands comprised in the term, and it is declared, that, if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of *A.* or his wife or children or issue: the covenant and this proviso are fraudulent and void as against a subsequent incumbrancer of *A.*'s life estate. *Phipps v. Lord Ennismore.* Page 131

2. *P. B.*, on his daughter's marriage, settled a sum of money on her and her husband and their issue; and, after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and if he died intestate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as any of his younger children should, in that event, become entitled to: Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger

younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death. *Willis v. Black*.

Page 170

3. By covenant in a marriage settlement, the husband was bound to give by his last will, or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: Held, that the covenant bound only such real estate as he should die seised of;

That the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime;

That children living at the death of the husband were alone entitled to the benefit of the covenant. *Needham v. Smith*.

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See APPROPRIATION OF PAYMENTS, 1.

EVIDENCE, 2.

CROSS REMAINDERS.

Cross remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross remainders as to the original shares. *Edwards v. Alliston*.

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DEBTOR AND CREDITOR.

1. Where a debtor, by a deed-poll, directs, *inter alia*, the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, and without the privity of the creditor. *Page v. Broom*. Page 6
2. The Plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond: he is only a simple contract creditor of the testator.

Jones v. Davids.

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See INTERPLEADER, 1.

DEMURRER.

1. If, of several plaintiffs, some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. *The King of Spain and Others v. Machado*. 225
2. An instrument, executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different. *The King of Spain and Others v. Machado*. 225
3. A general demurrer for want of equity allowed, where it appeared on the face of the bill, that, of two co-plaintiffs, one had not any interest

interest in the matters of the suit.

Cuff v. Platell. Page 242

4. A bill by some shareholders in a joint stock company, on behalf of themselves and the other shareholders, seeking to compel directors of the company to refund money improperly withdrawn from the common stock, is not demurrable on the ground that all the shareholders are not made parties. *Hichens v. Congreve.*

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See APPEAL, 2.

DEVISE.

See ESTATE.

WILL.

DISMISSAL OF A BILL.

See PRACTICE, 15.

DOMICILE.

See REHEARING.

DONATIO MORTIS CAUSA.

- Quære, Whether a *donatio mortis causa* is avoided by the fact, that a will or codicil is subsequently made? — Whether a remainder may be limited on a *donatio mortis causa*? — Whether, the *donatio mortis causa* being of a mortgage debt, a gift of the same sum, with the same remainder over, in a subsequent codicil, is to be considered a satisfaction? *Ham-brooke v. Simmons.* 25

ESTATE.

1. A devise of real estate to *A.* for life, with remainder to her chil-

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dren, as tenants in common, and, in case *A.* shall die without leaving lawful issue, then with remainder over, is a gift to *A.* for life, with remainder to her children for life, with remainder to *A.* in tail. *Parr v. Swindels.*

Page 283

2. A gift to *A.* and *B.*, "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," will pass the fee-simple of real estate. *Thomas v. Phelps.* 348

EVIDENCE.

1. The petition of a Defendant prayed that he might be at liberty to examine one of the Plaintiffs as a witness: the Plaintiffs were copartners, and had a common interest adverse to the petitioner: the petition was dismissed with costs. *Fereday v. Wightwick.* 114
2. The question being, whether the appointment of a curate belonged to the vicar of the parish or to a corporation, entries in old books of the corporation were not received as evidence against the vicar, to shew that the corporation had from time to time appointed the curate. *The Attorney-General v. The Corporation of Warwick.* 222
3. Where the answer of a Defendant insists that a covenant was inserted, without his knowledge or consent, in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such

such deed cannot be proved *vivd voce* against him as an exhibit; but it may be so proved as against another Defendant, whose answer does not impeach the validity of the covenant. *Barfield v. Kelly.* Page 355

4. At the hearing of the cause, a bill will be dismissed, if there be no evidence against a Defendant, although, upon a motion for an injunction, a case was made against him, on which an *ex parte* injunction was sustained. *Ibid.* 355
5. A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards, and before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within the statute of frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley.* 423
6. Collateral circumstances relating to the ages of the several devisees, and to their being married or unmarried, are admissible in evidence, for the purpose of ascertaining the true construction of the will. *Lowe v. Lord Huntingtower.* 532 n.

EXCEPTIONS.

See PRACTICE, 2.

EXECUTOR.

1. An agent, named executor, is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff v. Are.* Page 33
2. A testatrix appointed *A. B.* to be her executor, to see that her will was put in force: the executor is a trustee for the next of kin. *Braddon v. Farrand.* 87

EXHIBITS.

See EVIDENCE, 3.

FAMILY

See POWER, 4.

FAMILY ARRANGEMENT.

See COMPROMISE, 1.

FOREIGN INSTRUMENT.

An instrument, executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different. *The King of Spain v. Machado.* 225

FORFEITURE.

See COMPENSATION, 1.

MARRIAGE, 2.

FRAUDU-

FRAUDULENT CONVEY- ANCE.

A. being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument, by which *A.* covenants not to sell or incumber the lands comprised in the term; and it is declared, that, if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of *A.*, or his wife or children or issue: the covenant and this proviso are fraudulent and void as against a subsequent incumbrancer of *A.*'s life estate. *Phipps v. Lord Ennismore*. Page 131

See VOLUNTARY SETTLEMENT.

HEIR.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir at law will take

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the legacy, and not the next of kin.

In such a case, it makes no difference, that there are three co-heirs. *Mounsey v. Blamire*.

Page 384

See ISSUE, 2.

BOND, 2.

IMPERTINENCE.

1. The Court will decide, in the first instance, on alleged impertinence in affidavits sworn in bankruptcy, where the impertinence is of such a kind, that there would be nothing gained, in point of convenience, by directing a reference to the Master. *Ex parte Palmer in re Daniell*. 188
2. An affidavit, verifying a shorthand writer's notes of a trial at Nisi Prius, which involved the same question as is raised on a petition in bankruptcy, is wholly impertinent. *Ibid*. 188

INDIAN SECURITIES.

See CONVERSION, 1.

INFANT.

1. An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland*. 296
2. The Court will make an order for appointing a guardian and allowing maintenance, upon petition without bill, where the infant's income does not exceed 300*l.* a year. *Ex parte Lakin, in the Matter of Lakin*. 307
3. Main-

3. Maintenance will not be allowed, without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l*. In the Matter of Sir William Molesworth.

Page 308 n.

INJUNCTION.

1. Where the obligor in a bond has obtained the common injunction to restrain the obligee from proceeding in an action which has been commenced in his name by an assignee of the bond, the answer of the obligee cannot be read in opposition to a motion to dissolve the injunction made by the assignee. *Montague v. Hill*. 128
2. *Qu*. Whether the proceedings of the assignee in the name of the obligee are stayed by an injunction, which restrains only the assignee, his counsellors and agents. *Montague v. Hill*. 128
3. *B.*, the holder of certain bills accepted by *F.*, attaches, by proceedings in the Lord Mayor's Court, in the hands of *C.*, a large sum of money belonging to *F.*; *F.* having filed a bill to restrain the action, a special injunction is granted, and the money is paid into Court by the garnishee; *B.* by his answer denies the whole of the equity suggested by the bill: Held, that, though the injunction must be dissolved, the money in Court will not be paid out to *B.*, before he has obtained judgment in his action. *Furnival v. Bogle*. 142
4. At the hearing of the cause, a

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bill will be dismissed, if there be no evidence against a Defendant, although, upon a motion for an injunction, a case was made against him, on which an *ex parte* injunction was sustained. *Barfield v. Kelly*. Page 355

5. French stock, the property of a bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, by her will, exercised a general power of appointment which she had over monies standing in the name of trustees in the English funds, and died in her husband's lifetime; one of the three sisters, who was also an appointee, and her residuary legatee, and usually resided in France, took out administration to her, with the will annexed. An injunction was granted at the suit of the assignee to restrain the trustees from transferring any of the stocks in the English funds over which the deceased wife's power of appointment extended. *Stead v. Clay*. 550

See AGENT, 4.

INQUISITION.

See LUNACY, 1.

INTEREST.

1. A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits, only from the time when a good title was first shewn, and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd*. 118

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2. A contract of purchase contained a stipulation, that, if, by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5l. per cent. on his purchase-money, and be entitled to the rents and profits of the premises: the vendor did not shew a good title till long after the specified day: Held, that he was not entitled to interest except from the time when a good title was first shewn. *Monk v. Huskisson*.

Page 121 n.

INTERPLEADER.

A testator having bequeathed a legacy to trustees on trust, to invest it on government or good security, and to pay the interest to a woman for life, and, after her death, to distribute the principal among certain persons; the executors and the trustees agreed that a bond-debt of equal amount, which was due to the testator, should be appropriated to the payment of the legacy, and communicated this arrangement to the obligor of the bond, who, for many years, paid the interest to the tenant for life, with the privity of the trustees: afterwards the surviving trustee of the legacy gave notice to the debtor not to pay the money to the executors, who, on the other hand, commenced an action upon the bond; the debtor having filed a bill of

interpleader, the executors demurred; but the demurrer was over-ruled. *Wright v. Ward*.

Page 215.

ISSUE.

1. Persons, who were found by the Master to be the next of kin of the intestate, and were named by the Court to be defendants in an issue directed to try the rights of other persons, who claimed also to be next of kin, were allowed a sum of 500l. out of the estate of the intestate, on giving security to account for it. *Gregg v. Taylor*. 279
2. If an heir at law, alleging insanity in a devisor, file his bill against the devisee, and he fail in the issue *devisavit vel non*, he shall pay the costs of the suit, unless he might have asserted his claim by ejectment; and then his suit will be deemed vexatious, and he will be ordered to pay the costs of it. *Scaife v. Scaife*. 309
See T17

JOINT STOCK COMPANIES.

1. Some shareholders in a joint stock company may sue, on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company to refund monies improperly withdrawn by them from the stock of the company, and applied to their own use. *Hickens v. Congreve*. 562
2. A clause in an act of parliament, passed for the regulation of a joint stock

stock company, provided, that all proceedings, whether at law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons should be a member or members of the company or not, should be instituted and carried on in the name of the chairman or of one of the directors as the nominal plaintiff: such a clause does not apply to a case in which directors appropriate to their own use part of the joint stock by charging the company with a much larger sum as the price of property purchased by them, than was actually paid. *Hichens v. Congreve*. Page 562

JURISDICTION.

See LUNACY, 2.

LACHES.

See LEASEHOLD, 2.

LEASEHOLD.

1. The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the cestuisque vie, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased person was one of the cestuisque vie named in the lease: The bill

was dismissed with costs; because the Plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence. *Harries v. Bryant*.

Page 89

2. Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent and fine certain, of the tithes of a parish, had been regularly granted by the respective bishops of *Ely*, who were improper rectors of the parish, to the vicars for the time being. *The Attorney-General v. The Bishop of Ely*. 102
3. A testator devised premises, which he held by lease under the dean and chapter of Westminster to *A.* for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after *A.*'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until *B.* should attain his age of twenty-one years, to whom the testator bequeathed all the remaining term and interest which he had in the lease: the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the dean and chapter was, to renew every seven years on receiving a reasonable fine; and, at the death of the testator, about thirty years of the term were unexpired: Held, that *A.* was not bound to renew the lease

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at

at any time during her life.

Capel v. Wood. Page 500

4. Order made, *ex parte* under the 6 *Ann. c. 18.*, that a lessee for lives should produce the *cestuique vie* to persons named, and at a time and place specified in the order. *Ex parte Whalley.*

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LEGACY DUTY.

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty,—there the annuities shall be paid clear of legacy duty. *Smith v. Anderson.*

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LEGACY, LAPSED.

See WILL, 5.

LEGACY, SPECIFIC.

A testator gives a specific bequest to *A.*, and directs that, in consideration of the bequest, *A.* shall pay his debts, and makes *A.* his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if *A.* accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him. *Messenger v. Andrews.*

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See WILL, 2. 23.

LIEN.

1. If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate.

Quære. If a pecuniary legatee would be entitled to the same benefit against the devisee? *Selby v. Selby.* Page 336

2. A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards, and before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within the statute of frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley.* 423

3. A business, which was the property of *A.*, was carried on in the name of *B.*, who was the agent of *A.* at a fixed salary; *A.* being under considerable liabilities in respect of that business, *B.* became bankrupt; *A.* was held to have a lien on the property of the

the concern to the extent of his liabilities; and the assignees of *B.* were restrained from interfering with the business or the property belonging to it, and from receiving monies due to it. *Foxcraft v. Wood.* Page 487

LUNACY.

1. Under a commission of lunacy, the jury found, "that the party is not a lunatic, but that, partly from paralysis and partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, and, consequently, of unsound mind, and that he has been so for the term of two years last past:" — The inquisition was quashed, and a new commission was ordered to issue. *In Re Holmes.* 182
2. The Court will protect the property of a supposed lunatic in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury; but it will, at the same time, take care that ample means for resisting the commission be furnished to those who act in the inquiry, on the alleged lunatic's behalf. *Ibid.* 186

MAINTENANCE.

See INFANT, 2, 3.

MARRIAGE.

1. A testator gave to his daughter a legacy of 10,000*l.*, "payable and

to be paid unto her in manner following; viz. a sum of 5000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5000*l.* within two years afterwards." The daughter married under twenty-one, without consent of the trustees; and her first husband dying, she married a second husband at the distance of thirty years from her first marriage:

Quære, if, on such second marriage, she became entitled to the 10,000*l.*? *Clifford v. Beaumont.*

Page 325

2. Where the husband incurs a forfeiture, under the twenty-third section of 4 G. 4. c. 76., the Court has no discretion to mitigate the penalty, but is bound to settle and secure all property, present and future, of the wife, for the benefit of herself or the issue of the marriage. *Attorney-General v. Mulla.* 329

MARRIAGE SETTLEMENT.

1. *P. B.*, on his daughter's marriage, settled a sum of money on her and her husband and their issue; and after reciting that he had agreed to make a further provision for his daughter, equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should, by his will or otherwise, provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and if he died in-

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testate, or omitted to make such provision, that his executors should pay to the trustees as great a share of his property as any of his younger children should, in that event, become entitled to: Held, that the trustees had a claim upon the executors in respect of subsequent advancements by the settlor to his other younger children in his lifetime, and not merely for a provision equal to that which any of the other children became entitled to at his death. *Willis v. Black.* Page 170

2. By covenant in a marriage settlement, the husband was bound to give by his last will, or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: Held, that the covenant bound only such real estate as he should die seised of;

That the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime;

That children living at the death of the husband were alone entitled to the benefit of the covenant. *Needham v. Smith.* 318

See COVENANT, 1.

MONEY, PAYMENT OF, INTO COURT.

It is competent to the Court, on the hearing of exceptions, at the same time it allows an exception taken by the Defendant, and directs the Master to review his report generally, to order the Defendant to pay a sum of mo-

ney into Court, if it is satisfied that ultimately that sum will be found due from the Defendant. *Brown v. De Tastet.* Page 126

MORTGAGE.

1. A mortgagee has no title to the rents of the mortgaged premises, which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor; notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him.

He ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke.* 64

2. A first application by a mortgagor to enlarge the time for payment of the mortgage money refused. *Nanny v. Edwards.* 124

MORTMAIN.

A school-house, built prior to the 9 G.2. c. 36., on waste of a manor given by the lord for that purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy. *Ingleby v. Dobson.* 342

NEXT OF KIN.

See POWER, 4.

NOTICE

NOTICE.

See MORTGAGE, 1.
PARTNERSHIP, 4.

PARTIES.

1. A defect of parties may be cured at the hearing, by the undertaking of the Plaintiff to give full effect to the utmost rights which the absent party could have claimed, those rights being such as do not affect the rights of Defendants. *Harvey v. Cooke*. Page 34
2. If *A.*, for valuable consideration, undertakes to surrender a copyhold to *B.*, and *B.*, on borrowing money from *C.*, enters into a written agreement with *C.*, that he, *B.*, will surrender the same copyhold to *C.* by way of mortgage security, *A.* is not justified in refusing to surrender the copyhold to *B.*, because he, *A.*, has received notice from *C.* of the agreement between him and *B.*: the surrender by *A.* to *B.* does not prejudice, but promotes, that agreement: and *C.* is not a necessary party to a suit to compel *A.* to surrender to *B.* ——— *v. Walford*. 372
3. A bill by some shareholders in a joint stock company, on behalf of themselves and the other shareholders, seeking to compel the directors of the company to refund money improperly withdrawn from the common stock, is not demurrable on the ground that all the shareholders are not

made parties. *Hichens v. Congreve*. Page 562

See DEMURRER.
PLEA.

PARTNERSHIP.

1. *A.*, *B.*, and *C.*, carrying on business in copartnership for a term, which would expire on the 19th of *February* 1807, under articles which empowered *A.*, in case of his death during the term, to bequeath his share of the trade in favour of his wife or children, — *S.*, a customer of the bank, and and a surety, covenanted that they, or one of them, would pay to *A.*, *B.*, and *C.*, the survivors or survivor of them, &c. all sums, which, on, before, or until the 19th of *February* 1807, should become due from the customer to *A.*, *B.*, and *C.*, the survivors or survivor of them: *A.* died, having bequeathed his share of the concern to his executors, in trust for his children: the business continued to be carried on under the same firm as before; and his executors interfered in the management, and shared in the profits. At the time of *A.*'s death, the balance due from *S.* to the bank was upwards 14,000*l.*; after that time *S.* continued his dealings with the bank in the same manner as previously, paying in more than 14,000*l.* within a few weeks after *A.*'s death, but drawing out, during the same period, a larger sum; and these subsequent dealings were contained in the same account current with the preceding dealings: some
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years afterwards, *S.* became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards: Held,

That the partnership, which carried on the business after the death of *A.*, was a new partnership;

That the surety's covenant did not extend to cover sums advanced to the customer by the bank after *A.*'s death;

That the balance, due at *A.*'s death from the customer, was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton v. Oakes.* Page 154

2. Where a partnership is dissolved, and, after the dissolution, one of the partners, without the consent of the other, continues in possession of the partnership effects, and carries on the same business on the same premises, in the course of which the specific effects that belonged to the partnership are, in whole or in part, consumed, and replaced by others; the effects, which are found on the premises, and with which the business is carried on at the date of a decree, declaring the partnership to have been dissolved before the institution of the suit, are not to be treated as property of the partnership. *Nerot v. Burnand.* 247

3. Evidence of the existence of a partnership. *Nerot v. Burnand.* 247

4. Where notice is given by a party to his agent in a particular adventure, that another person is jointly

interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure.

But this obligation ceases to exist, if the transactions shew that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter. *Killock v. Greg.*

Page 285

5. A general dissolution of partnership between *A.* and *B.* does not operate to discharge *A.* from his responsibility for the subsequent conduct of *B.* in respect of the engagements of the partnership with third persons, made prior to the dissolution. *Ault v. Goodrich.* 430
6. If *A.* and *B.*, as partners, engage in a speculation with *C.*, *A.* is answerable to *C.* in respect of the dealings of *B.* in the joint speculation. *Ault v. Goodrich.* 430

PERPETUITY.

1. A limitation to an unborn child for life is not good, unless the remainder vests in interest at the same time.

A testatrix, after expressing her desire that certain stock should remain in the three per cents. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them; and directed, that, after the decease of all of them, their children should succeed to the annuity of their deceased parent, and

and that, after the decease of the seven children's children, the dividends of the stock should devolve in annuities upon the lawful heirs of the testatrix: Held, that all the gifts were void, except the life interests given to the seven children. *Hayes v. Hayes.* Page 311

2. If the interest of an unborn child of a person in being does not vest when such unborn child attains twenty-one, the gift is too remote and void, and the limitations over are void also. *Palmer v. Holford.* 403

3. In a will, the words "failing the male issue," were, upon the whole context, construed to mean, "if there shall be no son then living."

A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of *A.*, and, failing, the male issue of *A.*, to the daughters of *A.* living at the demise of such male issue; at the death of the annuitant, *A.* had no son living, but had two daughters: Held, that the gift to the daughters of *A.* was not too remote, and that they were entitled to the annuity. *Murray v. Addenbrook.* 407

4. The same testator gave the residue to his widow during her life, and at her demise, to the eldest surviving son of *A.* upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or, failing such male issue, to the daughters of *A.* liv-

ing at the time of the demise of the last of such male issue; the only son of *A.* died under twenty-five, in the lifetime of the widow, leaving two daughters of *A.* him surviving: Held,

That, if there had been any son of *A.* living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five:

That the gift over of the residue to the daughters of *A.* was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue. *Murray v. Addenbrook.* Page 407

PETITION.

1. The Court will make an order for appointing a guardian and allowing maintenance, upon petition without bill, where the infant's income does not exceed 300*l.* a year. *Ex parte Lakin, in the matter of Lakin.* 307
2. Maintenance will not be allowed, without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l.* *In the matter of Sir William Molesworth.* 308 n.

PLEA.

1. A plea, shewing that one of two Plaintiffs has no interest in the matters of the suit, is a good defence to the whole bill. *Makepeace v. Haythorne.* 244
2. To a bill, stating a settlement, under which, after a life estate to *A.*, the Plaintiff was entitled to certain

certain hereditaments, and praying delivery of the title deeds, the Defendant put in a plea of purchase for valuable consideration from *A.*, without notice, averring that *A.* pretended to be seised in fee, and was in possession, but not averring that he had any title prior to and independent of the settlement. *Quære*, Whether such a plea is a good defence to a suit? *Jackson v. Rowe.*

Page 514

3. A plea of purchase for valuable consideration without notice, must aver, that the vendor pretended to be seised, not merely before, but at the respective times of the execution of the conveyance, and of the payment of the consideration. *Jackson v. Rowe.* 514

4. *Semble.* Leave will not be given to amend a plea, unless the Court is satisfied that the defect, which the amendment is intended to remedy, arose from an accidental slip. *Jackson v. Rowe.* 514

PLEADING.

1. Petition of re-hearing dismissed, because it suggested, as the grounds of re-hearing, facts not alleged in the pleadings. *Nevinson v. Stables.* 210

2. Two out of several plaintiffs, in a suit instituted against a trustee for breach of trust, had given an indemnity to the defendant: Held, that the other plaintiffs, who were infants, were nevertheless entitled to such decree as the case demanded, and that, as the same justice could be

done to the Defendant in respect of the two who had signed the deed of indemnity, as if these two had been made defendants, an objection at the hearing, grounded on their being co-plaintiffs, could not be allowed to have the effect of rendering the expense of the suit wholly useless. *Wilkinson v. Parry.* Page 274

3. Where the answer of a Defendant insists that a covenant was inserted, without his knowledge or consent, in a deed executed by him, and that the deed was not read over to him, and that the covenant is a fraud upon him, such deed cannot be proved *viva voce* against him as an exhibit; but it may be so proved as against another Defendant, whose answer does not impeach the validity of the covenant. *Barfield v. Kelly,* 355

4. At the hearing of the cause, a bill will be dismissed, if there be no evidence against a Defendant, although, upon a motion for an injunction, a case was made against him, on which an *ex parte* injunction was sustained. *Barfield v. Kelly.* 355

5. A Plaintiff must establish at the hearing, that he had a title to relief at the time of filing his bill; or, if he relies on matter subsequent, he must file a supplemental bill. *Barfield v. Kelly.* 355

6. Some shareholders in a joint stock company may sue, on behalf of themselves and the other shareholders, for the purpose of compelling directors of the company

pany to refund monies improperly withdrawn by them from the stock of the company, and applied to their own use. *Hichens v. Congreve*. Page 562

See DEMURRER.
PLEA.

POWER.

1. A will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power. *Walker v. Mackie*. 76
2. The subject of the power will pass by the words of "all other my property," if it be plain, from other expressions in the will, that, under these general words, she considered the property under the power to be included. *Walker v. Mackie*. 76
3. A gift of personal estate to the wife for life, with a direction, that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment; and the sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power. *Reith v. Seymour*. 263
4. Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power

to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.

Grant v. Lynam. Page 292

5. A *feme covert*, described as such in the will of the testator, may, during the coverture, execute by deed a power of disposition, given her by the will, over real and personal estate. *Downes v. Timperon*. 334

PRACTICE.

1. The petition of a Defendant prayed that he might be at liberty to examine one of the Plaintiffs as a witness: the Plaintiffs were copartners, and had a common interest adverse to the petitioner: the petition was dismissed with costs. *Fereday v. Wightwick*. 114
2. It is competent to the Court, on the hearing of exceptions, at the same time it allows an exception taken by the Defendant, and directs the Master to review his report generally, to order the Defendant to pay a sum of money into Court, if it is satisfied that ultimately that sum will be found due from the Defendant. *Brown v. De Tastet*. 126
3. *B.*, the holder of certain bills accepted by *F.*, attaches by proceedings in the Lord Mayor's Court, in the hands of *C.*, a large sum of money belonging to *F.*;
F.

certain hereditaments, and praying delivery of the title deeds, the Defendant put in a plea of purchase for valuable consideration from *A.*, without notice, averring that *A.* pretended to be seised in fee, and was in possession, but not averring that he had any title prior to and independent of the settlement. *Quære*, Whether such a plea is a good defence to a suit? *Jackson v. Rowe.*

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F.

- F.* having filed a bill to restrain the action, a special injunction is granted, and the money is paid into Court by the garnishee; *B.* by his answer denies the whole of the equity suggested by the bill: Held, that though the injunction must be dissolved, the money in Court will not be paid out to *B.*, before he has obtained judgment in his action. *Furnival v. Bogle.* Page 142
4. A party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. *Furnival v. Bogle.* 142
5. How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by the consent of counsel in Court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Furnival v. Bogle.* 142
6. A Defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, made in the relation of solicitor and client during the progress of the suit, or with reference to it, previous to its commencement. *Hughes v. Bidulph.* 190
7. A Plaintiff is not entitled to the production of a letter, admitted by the Defendant to be in his possession, but which, the Defendant states, was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. *Vent v. Pacey.* Page 193
8. The Court will make an order for appointing a guardian and allowing maintenance upon petition without bill, where the infant's income does not exceed 300*l.* a year. *Ex parte Lakin, in the matter of Lakin.* 307
9. Maintenance will not be allowed without a bill filed, to an infant entitled to real estate, which is of a yearly value exceeding 100*l.* *In the matter of Sir William Molesworth.* 308 n.
10. Where the decree, among other things, refers it to the Master to appoint a new trustee, the certificate of the appointment of such new trustee is to be considered as a separate report. *Harris v. Kemble.* 474
11. A cause was heard at the Rolls, but before judgment was pronounced, accidental circumstances rendered the hearing ineffectual; the Plaintiff then set it down before the Lord Chancellor, and obtained an order, of which the Defendant had notice, assigning it a particular position in the Lord Chancellor's paper, but did not serve a new *subpœna* to hear judgment: when it was called on before the Lord Chancellor, the Defendant made default, and the Plaintiff

Plaintiff took a decree *nisi*: Held, that it was not necessary to serve a new *subpoena* to hear judgment, and that the decree *nisi* was strictly regular. *Jackson v. Bourne*. Page 484

12. Leave refused in a tithe suit, to file a supplemental answer, setting up a *modus* after the cause had been set down for hearing. *Macdougall v. Purrier*. 486

13. An attachment, sealed after an order for time has been obtained, but before it has been served on, or notified to, the plaintiff, is regular. *Hewes v. Hewes*. 508

14. Where a Defendant dismisses a bill for want of prosecution, without having made a motion of which he had given notice, the Plaintiff cannot afterwards obtain an order for the payment of the costs of that motion, as being a motion abandoned. *Farquharson v. Pitcher*. 510

15. Order made to stay proceedings to enforce an answer, pending an appeal to the House of Lords against an order overruling a demurrer. *The King of Spain v. Machado*. 560

16. An attachment is irregular, if it is sealed and delivered out by the sealer, before, though it is not parted with till after, the requisite affidavit is filed. *Gardner v. Rowe*. 578

PRESUMPTION.

Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent and fine certain, of the tithes of

a parish, had been regularly granted by the respective bishops of *Ely*, who were inappropriate rectors of the parish, to the vicars for the time being. *The Attorney-General v. the Bishop of Ely*. Page 102

PRODUCTION OF DOCUMENTS.

See PRACTICE, 6, 7.

PROMISSORY NOTE.

See WILL, 2.

RECEIVER.

1. A receiver appointed by the Court is not answerable for a loss of monies by the failure of a banker, if they are not mixed with his own monies, and are *bonâ fide* deposited for security only, under circumstances in which they could not have been properly paid into court. *Salway v. Salway*. 60

2. A solicitor in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect. *Wood v. Wood*. 558

See MORTGAGE, 1.

RE-HEARING.

1. Petition of re-hearing dismissed, because it suggested, as the grounds of re-hearing, facts not alleged in the pleadings. *Nevinson v. Stables*. 210

2. In a suit instituted for the administration of the assets of a testator,

testator, who in his will described himself as of "*Halifax in Nova Scotia*," certain lapsed shares of the residue were, at the hearing, on further directions, ordered to be distributed according to the statute of distributions, there being no suggestion in the record that the administration ought not to be according to the law of *England*: afterwards, a petition of re-hearing was presented, stating, that the testator died domiciled in *Nova Scotia*, and praying, that the distribution might be according to the law of that country: but the petition was dismissed. *Nevinson v. Stables*. Page 210

REMAINDER.

See DONATIO MORTIS CAUSA.

CROSS REMAINDERS.

TENANT FOR LIFE, 1.

RELATIONS.

See POWER.

REMOTENESS OF LIMITATIONS.

See PERPETUITY.

RENEWAL.

1. The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the cestuique vie, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months,

know that the person was dead, or that the deceased person was one of the cestuique vie named in the lease: The bill was dismissed with costs; because the Plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence. *Harries v. Bryant*. Page 89

2. Every presumption is to be made to support a right of renewal, where, from 1682, leases for twenty-one years, at a small rent and fine certain, of the tithes of a parish, had been regularly granted by the respective bishops of *Ely*, who were improper rectors of the parish, to the vicars for the time being. *The Attorney-General v. The Bishop of Ely*. 102

3. A testator devised premises, which he held by lease under the dean and chapter of Westminster, to *A.* for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after *A.*'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until *B.* should attain his age of twenty-one years, to whom the testator bequeathed all the remaining term and interest which he had in the lease: the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the dean and chapter was, to renew every seven years on receiving a reasonable fine; and, at the death

death of the testator, about thirty years of the term were unexpired: Held, that *A.* was not bound to renew the lease at any time during her life. *Capel v. Wood.* Page 500

. RESIDUE.

See ANNUITY, 1.

REVOCATION.

1. A conveyance of an estate to trustees, upon trust to sell for payment of debts, is not a revocation of a prior will, because it declares that the surplus monies arising from the sale shall be personal estate of the testator; but if it have the further purpose to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife will be entitled to the annuity, after the death of the husband, if the sale do not take place in his lifetime. *Hodges v. Green.* 28
2. A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate. *Francis v. Collier.*

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3. A testator made his will duly executed and attested so as to pass real estates, by which he gave to his younger sons 4000*l.* each, and to his daughters 3000*l.* each, payable exclusively out of his real estates; he afterwards obliterated the words "four" and "three," and wrote over them "three" and "one;" but the will was not re-executed or republished; he subsequently made a codicil, signed by him, but not executed or attested so as to pass real estates, by which he reduced the portions given to the younger sons and daughters, according to the alterations in the will: The younger sons and daughters were held to be entitled to the portions originally given to them by the will. *Kirke v. Kirke.* Page 435

SATISFACTION.

See DONATIO MORTIS CAUSA.

SCOTLAND.

See BOND.

SOLICITOR AND CLIENT.

1. The payment of a solicitor's bill pending a suit, does not preclude subsequent taxation. *Howell v. Edmunds.* 67
2. A Defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, or between his country solicitor and town solicitor, made in the relation of solicitor and client during the

the progress of the suit, or with reference to it, previous to its commencement. *Hughes v. Bidulph.* Page 190

3. A Plaintiff is not entitled to the production of a letter, admitted by the Defendant to be in his possession, but which, the Defendant states, was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. *Vent v. Pacey.* 193

4. As between the client and the solicitor, the Court will take care the client shall not be a sufferer in respect of unnecessary proceedings instituted by the solicitor. *Wood v. Wood.* 558

5. A solicitor in a cause, who improperly assumes the character of receiver, is responsible for rents lost by his neglect. *Ibid.* 558

See CONSENT, 2.

SPECIFIC PERFORMANCE.

1. If, after a contract for sale of an estate, but before the title is accepted, the title-deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of shewing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Busk.* 1

2. If an agreement be in part unperformed, the principle of a court of equity is compensation, not forfeiture. *Page v. Broom.* 6

18

3. In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports, that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. *Long v. Collier.* Page 269

4. An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland.* 298

STATUTES, CONSTRUCTION OF.

29 Car. 2. c. 8.	104
6 Ann. c. 18.	559
4 Geo. 4. c. 76.	329
6 Geo. 4. c. 74.	511
6 Geo. 4. c. 181.	570

STATUTE OF FRAUDS.

A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards, and before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within the statute of frauds, and parol evidence is not admissible

admissible to prove the trust ; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley*. Page 423

STATUTE OF LIMITATIONS.
(See *Ault v. Goodrich*, Page 430.)

SUPPLEMENTAL BILL.

See PLEADING, 5.

SURETY.

1. *A.*, *B.*, and *C.*, carrying on business in copartnership for a term, which would expire on the 19th of *February* 1807, under articles which empowered *A.*, in case of his death during the term, to bequeath his share of the trade in favour of his wife or children, — *S.*, a customer of the bank, and a surety, covenanted that they, or one of them, would pay to *A.*, *B.*, and *C.*, the survivors or survivor of them, &c. all sums, which, on, before, or until the 19th of *February* 1807, should become due from the customer to *A.*, *B.*, and *C.*, the survivors or survivor of them, &c.: *A.* died, having bequeathed his share of the concern to his executors, in trust for his children: the business continued to be carried on under the same firm as before: and his executors interfered in the management and shared in the profits. At the time of *A.*'s death, the balance due from *S.* to the bank was upwards of 14,000*l.*; after that time *S.* continued his dealings with the bank in the same manner as previously, paying in more than

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14,000*l.* within a few weeks after *A.*'s death, but drawing out, during the same period, a larger sum; and these subsequent dealings were contained in the same account current with the preceding dealings; some years afterwards, *S.* became insolvent, being indebted to the bank in a balance of 19,000*l.* and upwards: Held,

That the partnership, which carried on the business after the death of *A.*, was a new partnership;

That the surety's covenant did not extend to cover sums advanced to the customer by the bank after *A.*'s death;

That the balance, due at *A.*'s death from the customer, was to be considered as discharged by the payments subsequently made by him to the bank. *Pemberton v. Oakes*. Page 154

2. The Plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond: he is only a simple contract creditor of the testator. *Jones v. Davids*. 277
3. *B.* being hired as a clerk to *A.* and Co., but not for any definite period, *C.* and *D.* joined with him in a bond to secure his duly accounting for his assets; *C.* died, and his executrix gave a written notice to *A.* and Co., that she would no longer remain surety; *A.* and Co. communicated this notice to *B.*, and required and obtained from him the bond of another surety; *D.*, and also the new surety, died; and,

Ss

four

four years and a half after the death of *C.*, *B.* died, when deficiencies were found in his accounts, subsequent to the notice: Held, that the executrix of *C.* had no equity to restrain *A.* and *Co.* from proceeding at law on the bond. *Gordon v. Calvert.*

Page 581

TAXATION.

See Costs, 1.

TENANT FOR LIFE.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for *A.* during her life, and, after her death, for *B.* The trustees permitted a share, which the testator had in an *Indian* loan, bearing interest, at 10*l.* per cent., to remain for several years on that security, during which time they paid to *A.* the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from the testator's death: Held,

That the tenant for life was not entitled to the actual interest,

which the money yielded, while it remained on the *Indian* security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death;

That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the *Indian* rate of interest; and that they ought to be allowed in their discharge, as payment to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the *Indian* security and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes v. Scott.* Page 195

See POWER, 3.

WILL, 5. 11.

RENEWAL, 3.

TITHES.

1. As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smilh v. Tolcher.*

2. In

2. In a bill by an impropriate rector for the tithes of lands, in respect of which there is no evidence that tithes have ever been paid to the rector, an issue will not be directed, if all the evidence which can be supplied is adduced in the suit, and the Court is of opinion, that upon that evidence a jury would not be justified in finding in favour of the defence set up by the occupier of the lands. *Ross v. Aglionby*.

Page 489

TITLE.

The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years. *Long v. Collier*.

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TITLE DEEDS.

If, after a contract for sale of an estate, but before the title is accepted, the title-deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of shewing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Busk*. 1

TRUST.

1. Where a debtor, by a deed-poll, directs, *inter alia*, the receiver of the rents of his estate to keep down the interest of a certain debt, the direction does not create a trust in favour of a creditor, if it be without consideration, and without the privity of the creditor. *Page v. Broom*. Page 6
2. A conveyance of an estate to trustees, upon trust to sell for payment of debts, is not a revocation of a prior will, because it declares that the surplus monies arising from the sale shall be personal estate of the testator; but if it have the further purpose to provide an annuity for the separate use of the wife until the sale, it will be a revocation, because the wife will be entitled to the annuity, after the death of the husband, if the sale do not take place in his lifetime. *Hodges v. Green*. 28
3. A mother, entitled to a considerable property under the will of a relation, in a conversation with the executor of that relation, expressed an intention to make a settlement of part of that property, which was standing in his name, upon her daughter, and requested the executor to instruct her solicitor to prepare such a settlement: on the prepared settlement being brought to her for execution. she had changed her mind, and refused to sign it: Held, that her intention, expressed in the conversation with the executor of her relation, did not amount to a declaration of trust, although the

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property was personal estate.

Bayley v. Boulcott. Page 345

4. A son conveys an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage, for the use of the son: the father died shortly afterwards, and before any money was raised, having by a will, subsequent to the conveyance, made a general devise of all his real estates: the case is within the statute of frauds, and parol evidence is not admissible to prove the trust; but the son has a lien on the estate as vendor for the apparent consideration, no part of which was paid. *Leman v. Whitley.* 423

TRUSTEE.

1. Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee; then, if a retiring trustee assign the trust property to the continuing trustee alone, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable. *Wilkinson v. Parry.* 272
2. *A.*, as administrator of a person deceased, has stocks, part of the assets, standing in his name; the letters of administration granted to *A.* are recalled, and administration is granted to *B.*, the sole next of kin of the deceased:

Held, that *A.* is not within the meaning of the 6 G. 4. c. 74. a trustee of the stocks, which, as administrator, had been transferred into his name. *Dew v. Clarke.* Page 511

See TENANT FOR LIFE, 1.

See PRACTICE, 11.

UNDERTAKING.

A defect of parties may be cured at the hearing, by the undertaking of the Plaintiff to give full effect to the utmost rights which the absent party could have claimed, those rights being such as do not affect the rights of the Defendants. *Harvey v. Cooke.* 34

VENDOR AND PURCHASER.

1. A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits, only from the time when a good title was first shewn, and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd.* 118
2. A contract of purchase contained a stipulation, that if by reason of any unforeseen or unavoidable obstacles, the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5l. per cent. on his purchase-money, and be entitled to the rents and profits of the premises: the vendor did

did not shew a good title till long after the specified day: Held, that he was not entitled to interest except from the time when a good title was first shewn.

Monck v. Huskisson. Page 121 n.

3. The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years. *Long v. Collier.* 267

4. As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smith v. Tolcher.* 302

5. If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate.

Quære. If a pecuniary legatee would be entitled to the same benefit against the devisee? *Selby v. Selby.* Page 336

6. A purchaser not compelled to take a title depending upon the words of a will, which were too doubtful ever to be settled without litigation. *Sharp v. Adcock.* 374

VERDICT.

See LUMACY, 1.

VESTING.

The intention of a testator, that his gift should not vest in the legatee, until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law v. Thompson.* 92

See PERPETUITY.

WILL, 24. 26.

VOLUNTARY SETTLEMENT.

The Court refused to set aside a voluntary deed executed by an old and infirm man, in favour of a person who had attended him as a surgeon, and had been occasionally consulted by him respecting the management of his property, and received the dividends of some stock for him; it appearing that the nature and effect of the deed were fully explained to the grantor by his solicitor before he executed it, and that he executed it of his own free will. *Pratt v. Barker.* 507

WILL.

WILL.

1. Where legacies are given upon trust to accumulate the interest and dividends, such accumulated interest and dividends will not pass by a gift over of the principal sums, unless the Court is satisfied, by a reference to other clauses of the will, that the interest and dividends were omitted in the gift over by clerical mistake. *Harvey v. Cooke*. Page 34
2. A bequest of a cabinet, with 'whatever it contains "except money," will not pass a promissory note payable to the testatrix of a date anterior to the will, and which, at her death, was found in the cabinet. *Read v. Stewart*. 69
3. A bequest to all the children of A. and their issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of A. as are living at the testator's decease. *Butter v. Ommaney*. 70
4. A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then living; and as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents: Held, that the children of such children of B. as died in the testator's lifetime took no share of the residue. *Butter v. Ommaney*. 73
5. A testatrix having devised her real and personal estate to trustees upon trusts for sale, directed that the proceeds of her real estate should be taken as part of her personal estate; and that out of the monies to arise by such sale, and out of all other her personal estate, several legacies should be paid; and she then gave the residue to A. B. for life, with remainder over: the personal estate was not sufficient to pay the legacies; some of the legatees died in the testatrix's lifetime; other legacies were not paid until the end of a year after the testatrix's death, during which time, the funds, out of which those legacies were paid, produced rents or dividends: Held, that the real estate was absolutely converted into personalty; That the lapsed legacies belonged to the residuary legatee, and not to the heir; And that the year's income of the fund, with which the legacies had been paid, formed part of the capital of the residue. *Amphlett v. Parke*. Page 75
6. A will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power. *Walker v. Mackie*. 76
7. The subject of the power will pass by the words of "all other my property," if it be plain, from other expressions in the will, that, under these general words, she considered the property under the power to be included. *Walker v. Mackie*. 76
8. A testator, by his will, gave certain annuities, and directed that the

the sums, set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate: By a codicil to his will, he stated, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: Upon the death of any annuitant, the sum, set apart to secure the reduced annuity, will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer v. Mills.* Page 86

9. A testatrix appointed *A. B.* to be her executor, to see that her will was put in force: the executor is a trustee for the next of kin. *Braddon v. Farrand.* 87

10. The intention of a testator, that his gift should not vest in the legatee, until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law v. Thompson.* 92

11. A gift of personal estate to the wife for life, with a direction, that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment; and the sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her

own name, does not amount to an exercise of her power. *Reith v. Seymour.* Page 263

12. A gift of real estate to *A.* for life, with remainder to her children, as tenants in common, and, in case *A.* shall die without leaving lawful issue, then with remainder over, is a gift to *A.* for life, with remainder to her children for life, with remainder to *A.* in tail. *Parr v. Swindels.* 283

13. Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import. *Grant v. Lynam.* 292

14. A testatrix, after expressing her desire that certain stock should remain in the 3 per cents. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them; and directed, that, after the decease of all of them, their children should succeed to the annuity of their deceased parent, and that, after the decease of the seven children's children, the dividends of the stock should devolve in annuities upon the lawful heirs of the testatrix: Held, that all

all the gifts were void, except the life interests given to the seven children. *Hayes v. Hayes*.

Page 311

15. A testator gave to his daughter a legacy of 10,000*l.*, payable and to be paid unto her in manner following, viz. a sum of 5000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5000*l.*, within two years afterwards." The daughter married under twenty-one, without consent of the trustees; and, her first husband dying, she married a second husband at the distance of thirty years from her first marriage :

Quære, if, on such second marriage, she became entitled to the 10,000*l.* *Clifford v. Beaumont*.

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16. A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil, he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate. *Francis v. Collier*.

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17. A gift to *A.* and *B.*, "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed

or enjoyed, of whatever nature or manner it may be," will pass the fee simple of real estate. *Thomas v. Phelps*.

Page 348

18. Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty,—there the annuities shall be paid clear of legacy duty. *Smith v. Anderson*. 352

19. Whether stock will or will not pass under the word "monies," or or under the word "goods," or under the word "chattels," depends upon the whole context of the will.

The word "goods," and equally the word "chattels," used simply and without qualification, will pass the whole personal estate, including stock.

A bequest of "all monies, goods, chattels, clothing, &c., the testator's property, which may remain after paying his funeral charges and debts," will pass the testator's interest in stock and money, *Kendall v. Kendall*. 360

20. A testator gives an annuity and pecuniary legacies, and then devises all the rest, residue, and remainder of his freehold, copyhold, and leasehold estates to trustees, for the use and benefit of his children. The annuity, and pecuniary legacies, given prior to the devise, are well charged upon the freehold, copyhold, and leasehold estates. *Cole v. Turner*. 376

21. A testatrix gives a legacy to the

the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment, to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband:" This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband. *Hardwicke v. Thurston.* Page 380

22. Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir at law will take the legacy, and not the next of kin.

In such a case, it makes no difference, that there are three co-heirs. *Mounsey v. Blamire.*

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23. A testatrix gave such of her jewels, as should, at her death, be deposited in her jewel-box at *Rundell and Bridge's*, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to *A.B.*; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at *Rundell and Bridge's*, nor was there any written paper designating who were to take the jewels:—the intended gift of the jewels wholly fails. *Jerningham v. Herbert.*

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24. The word "survivors," in a Vol. IV.

bequest to children, held, upon the context of the will, to mean, surviving so as to attain their respective ages of twenty-one. *Crozier v. Fisher.* Page 398

25. In a will the words "failing the male issue," were, upon the whole context, construed to mean, "if there shall be no son then living."

A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of *A.*, and failing the male issue of *A.*, to the daughters of *A.* living at the demise of such male issue; at the death of the annuitant, *A.* had no son living, but had two daughters: Held, that the gift to the daughters of *A.* was not too remote, and that they were entitled to the annuity. *Murray v. Addenbrook.* 407

26. The same testator gave the residue to his widow during her life, and at her demise, to the eldest surviving son of *A.* upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or, failing such male issue, to the daughters of *A.* living at the time of the demise of the last of such male issue; the only son of *A.* died under twenty-five, in the lifetime of the widow, leaving two daughters of *A.* him surviving: Held,

That, if there had been any son of *A.* living at the death of the widow, he would have taken a vested interest in the residue,

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though he had not then attained the age of twenty-five :

That the gift over of the residue to the daughters of *A.* was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue.

Murray v. Addenbrook. Page 407

27. A testator devised certain lands to his wife for life, and after her decease, to his eldest son in fee, chargeable, nevertheless, in aid of the other estates thereafter devised to him, with the payment of the several sums of money thereafter bequeathed to the testator's younger sons and daughters: then, after a specific bequest of personal chattels, he devised all his other real estates to trustees, until his eldest or some other son should attain twenty one, subject to the payment of the several sums of money thereafter bequeathed to his younger sons and daughters, with a direction that his trustees should in the mean time apply the rents and profits to the maintenance, education, and advancement of all his younger sons and daughters; and then he gave to his younger sons 4000*l.* each, and to his daughters, 3000*l.* each, to be paid to them at twenty-one by his eldest son, if he should attain twenty-one, or by such other son as should attain twenty-one, and become entitled to his real estates by virtue of his will, and he expressly charged all his real estates, including the remainder in fee of

the lands devised to his wife for her life, with the payment of the said several sums of money so given to his younger sons and daughters: the testator died intestate as to the residue of his personal estate.—Held, that the personal estate of the testator was not applicable to the payment of these legacies or portions. *Kirke v. Kirke.* Page 435

28. A testator devised his estates in the county of *Leicester* to trustees, upon trust to sell the same, and also his books and live and dead farming stock there, either together or in parcels, and to apply the money arising therefrom in manner after mentioned; when he subsequently directed the application of the fund, he spoke of it as "the monies to arise from the sale of my *Leicestershire* estate;" these words denote the whole fund, and include the monies arising from the sale of the books and stock, as well as the monies arising from the sale of the estates. *Earl of Newburgh v. Eyre.* 454

29. A testator gave one fifth of the yearly interest of a fund to *Mary*, two fifths to *James*, and two fifths to *Charles*; if *Mary* died without issue, the interest of her share was to be paid to *James* and *Charles* during their respective lives, if they were both alive, or to the survivor, if only one of them were alive; if *Charles* left issue, they were to be entitled to the principal monies, of which the interest had been given to their father; if *Charles* died without

without issue in the lifetime of *James*, all benefit of the bequest to *Charles* was to go to *James*; if *James*, without having been in possession of the family estate for a certain time, left issue other than an only son, such issue were to be entitled to all the principal monies, the interest whereof *James* might be entitled to as aforesaid; if *James* died without leaving such issue or having been in possession of the family estate for a certain time, all benefit of the bequest to *James* was to go to *Charles*, if then living; and if both *Charles* and *James* died without leaving any lawful issue to be entitled as aforesaid to the bequest, the fund was to go as the survivor of them should appoint; *Mary* died without issue, in the lifetime of *James* and *Charles*; then *James* died, leaving a daughter, without having been in possession of the family estate; and afterwards *Charles* died without issue: Held, that the whole fund belonged to the daughter of *James*. *Earl of Newburgh v. Eyre*. Page 454

30. A testator gives a specific bequest to *A.*, and directs, that, in consideration of the bequest, *A.* shall pay his debts, and makes *A.* his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if *A.* accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him. *Messenger v. Andrews*. 478

31. A testator devised premises, which he held by lease under the dean and chapter of Westminster, to *A.* for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after *A.*'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until *B.* should attain his age of twenty-one years, to whom the testator bequeathed all the remaining term and interest which he had in the lease: the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the dean and chapter was, to renew every seven years on receiving a reasonable fine; and, at the death of the testator, about thirty years of the term were unexpired: Held, that *A.* was not bound to renew the lease at any time during her life. *Capel v. Wood*.

Page 500

32. An unmarried woman, upwards of eighty years of age, devised lands to trustees and their heirs, upon trust for her kinsman, *W. S.*, during his life, and, after his decease, for his children then living in fee; and in case *W. S.* should die without leaving any such child, then upon trust to convey the lands to the next of kin of her late father and mother *J. H.* and *T. H.* both deceased, as her heirs and assigns, and if more than one, in equal shares, and proportions. *J. H.* and *T. H.* were not related to each other, and at the date of the

the will they had no children, or descendants of children, except the testatrix herself; so that, at her death, there was no person who was of kin both to her father and to her mother: Held, that no person could take, under the ultimate devise over, unless he was next of kin both to the father and to the mother, and there being no such person, that the property devolved to the testatrix's heir. *Pycroft v. Gregory*.

Page 526

33. Collateral circumstances relating to the ages of the several devisees, and to their being married or unmarried, are admissible in evidence, for the purpose of ascertaining the true construction of the will. *Lowe v. Lord Huntingtower*.

592 n.

34. A testator, who died in 1818, after devising a freehold house to his wife and her heirs, devised the residue of his freehold estates, situate in four specified parishes, or elsewhere in the county of Cambridge, to two trustees and their heirs, upon the trusts thereafter declared concerning the same; that is to say, upon trust that they should sell his several copyholds in the parishes aforesaid, and after satisfying the costs of the sale out of the monies thence arising, should pay the

residue to his executor for the purpose of satisfying, in the first place, certain legacies; and he then devised all the residue of his real and personal estate to A. B.: the testator, besides freeholds and copyholds situate in the four parishes, had freeholds not situate in the county of Cambridge, and copyholds not situate within the four parishes; and all the copyholds had been surrendered to the use of his will:

That the beneficial interest in all the freeholds, whether situate in the county of Cambridge or elsewhere, passed to the residuary devisee:

That the legacies were a charge only on the copyholds situate in the four parishes:

That no estate in those copyholds passed to the trustees, but only a power to sell:

That any surplus of the monies arising from the sale, which might remain after satisfying the legacies, passed by the residuary clause:

That the copyholds not situate within the four parishes passed to the residuary devisee. *White v. Vitty*.

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See DONATIO MORTIS CAUSA.

REVOCATION, 1.

LEASEHOLD, 3.

END OF THE FOURTH VOLUME.

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